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14-1470
No.

In the Supreme Court of the United States

WILLIAM ROBERT BERNARD, JR.,

Petitioner,

v.

STATE OF MINNESOTA,

Respondent.

On Petition for a Writ of Certiorari to The Supreme Court of Minnesota

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Minnesota law makes it a criminal offense for a person who has been arrested for driving while impaired to refuse to submit to a chemical test of the person's blood, breath, or urine to detect the presence of alcohol. Although the State acknowledges that such tests do not serve the purposes of officer safety or evidence preservation, a divided Minnesota Supreme Court held that a person may be compelled to submit to a warrantless breath test as a "search incident to arrest." From that starting point, the court held that the State may make refusal to submit to such a test a criminal offense. The question presented is:

Whether, in the absence of a warrant, a State may make it a crime for a person to refuse to take a chemical test to detect the presence of alcohol in the person's blood.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner William Robert Bernard, Jr. respectfully petitions for a writ of certiorari to review the judgment of the Minnesota Supreme Court in this case.

OPINIONS BELOW

The opinion of the Minnesota Supreme Court (App., *infra*, 1a-34a) is reported at 859 N.W.2d 762 (Minn. 2015). The decision of the Minnesota Court of Appeals (App., *infra*, 35a-46a) is reported at 844 N.W.2d 41 (Minn. App. 2014). The decision of the Minnesota District Court (App., *infra*, 47a-61a) is unreported.

JURISDICTION

The judgment of the Minnesota Supreme Court was entered on February 11, 2015. That court denied petitioner's motion for rehearing on March 16, 2015. This Court's jurisdiction rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides in relevant part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause * * *.

The Minnesota Statutes, M.S.A. § 169A.20(2), provide in relevant part:

> It is a crime for any person to refuse to submit to a chemical test of the person's blood, breath, or urine under section 169A.51 (chemical tests for intoxication), or 169A.52 (test refusal or failure; revocation of license).

M.S.A. § 169A.51(1) provides in relevant part:

> Any person who drives, operates, or is in physical control of a motor vehicle within this state or on any boundary water of this state consents, subject to the provisions of sections 169A.50 to 169A.53 (implied consent law), and section 169A.20 (driving while impaired), to a chemical test of that person's blood, breath, or urine for the purpose of determining the presence of alcohol, a controlled substance or its metabolite, or a hazardous substance. The test must be administered at the direction of a peace officer.

STATEMENT

Minnesota is one of thirteen States that make it a criminal offense for a person who has been arrested on suspicion of driving while impaired to refuse to submit to a warrantless test administered to determine the presence of alcohol in the person's blood. Under this statute, refusal to submit to a test is a crime that is wholly independent of the substantive offense of driving while impaired; a person may be convicted of test refusal even if he or she is not charged with a driving offense—or, indeed, is acquitted of such a offense.

In this case, a deeply divided Minnesota Supreme Court upheld the constitutionality of this criminal penalty, reasoning that compelled application of a breath test—a procedure that requires the insertion of a tube into the arrestee's mouth to obtain "deep-lung air"—is permissible as a routine search incident to arrest. In reaching this conclusion, the court below recognized that, when a search is directed at the area or items *near* an arrestee, the search is permissible as one incident to arrest only to protect officer safety or prevent the active destruction of evidence. But the court held that these limits do not apply at all when the search is of the *person* of the arrestee, making such personal searches *per se* permissible.

That holding is shockingly wrong: it untethers the search-incident-to-arrest exception to the Fourth Amendment's warrant requirement from the exception's rationale, while giving greater constitutional protection to an arrestee's pockets or handbag than to the arrestee's body. Unsurprisingly, the holding misunderstands recent decisions of this Court and is in tension with the rulings of other state courts of last resort and federal courts of appeals. And it addresses matters of enormous practical importance, upholding a sort of constitutionally dubious compelled-consent criminal statute that is applied many thousands of times every year and confusing the meaning of the search-incident-to-arrest doctrine. In all, as the dissent below explained, the Minnesota Supreme Court's decision "fundamentally departs from longstanding Fourth Amendment principles, and nullifies the warrant requirement in nearly every drunk-driving case." App., *infra*, 22a. Review by this Court is warranted.

A. Factual and legal background.

1. Minnesota law provides that any person "who drives, operates, or is in physical control of a motor vehicle within this state or on any boundary water of this state" is deemed, in specified circumstances, to "consent[] * * * to a chemical test of that person's blood, breath, or urine for the purpose of determining the presence of alcohol, a controlled substance or its metabolite, or a hazardous substance." M.S.A. § 169A.51(1). In specified circumstances—among them, when a person has been validly arrested for driving while impaired—the law also makes it "a crime for any person to refuse to submit to a chemical test of the person's blood, breath, or urine." M.S.A. § 169A.20(2). Criminal penalties for violation of the test-refusal statute are in many cases more onerous than those for the separate offense of driving while impaired; depending upon the circumstances, conviction of refusing to submit to a chemical test can lead to as many as seven years' imprisonment and a fine of up to $14,000. Minn. Stat. § 169A.24, subd. 2 (2014).

2. As recounted by the court below, this case "arises from a report that police received on August 5, 2012, that three men were attempting to get a boat out of the water at a boat launch in South Saint Paul. When police arrived at the boat launch, a witness told the officers that the men's truck became stuck in the river while they were trying to pull their boat out of the water." App., *infra*, 3a. One of the men, petitioner here, "admitted to police that he had been drinking, but he and the other men denied driving the truck." *Ibid.* When witnesses nevertheless identified petitioner as the truck's driver, the officers

arrested him on suspicion of driving while impaired. *Ibid.*

The officers proceeded to read petitioner the Minnesota Implied Consent Advisory, which informed him "that Minnesota law required him to take a chemical test, that refusal to take the test was a crime, and that he had the right to consult with an attorney so long as there was not an unreasonable delay in the administration of the test." App., *infra*, 3a-4a. At no point did the officers make any attempt to obtain a search warrant to authorize administration of the test. After petitioner declined to take the test, the State charged him with two counts of the crime of First Degree Driving While Impaired—Test Refusal, in violation of Minn. Stat. § 169A.20, subd. 1(1)-(2) (2014). *Id.* at 4a. First-degree test refusal carries a mandatory minimum sentence of three years in prison, with a maximum of seven years' imprisonment and a fine of up to $14,000. Minn. Stat. § 169A.24, subd. 2 (2014); § 169A.276, subd. 1(a) (2014).

B. The decisions below.

1. Petitioner filed a motion to dismiss, arguing that the State's imposition of criminal penalties for refusing to submit to a warrantless breath test violates the Fourth Amendment. App., *infra*, 50a. The state trial court agreed and ordered the prosecution dismissed. *Id.* at 47a-61a. The court started from the proposition that the Minnesota test-refusal statute is meant to impose criminal penalties only for refusal of a *lawful* demand to be tested. In this case, the court continued, a warrantless search is *per se* unreasonable, "subject only to a few specifically established and well delineated exceptions." *Id.* at 54a-55a (citations and internal quotation marks omitted). Those excep-

tions include consent and the existence of exigent circumstances, but here petitioner "refused to consent to provide a sample of his breath" and, under this Court's holding in *Missouri* v. *McNeely*, 133 S. Ct. 1552 (2013), something more is required than the "'natural dissipation of alcohol in the blood' to establish an exigency justifying a warrantless search." *Id.* at 55a, 58a. Accordingly, the trial court held, "[b]ecause no warrant was obtained and none of the recognized exceptions to the warrant requirement apply, no lawful basis exists in this case to request submission to a chemical test." *Id.* at 59a. On the State's appeal, however, the Minnesota Court of Appeals reversed, holding that the State could compel petitioner to take a blood alcohol test because the arresting officers had probable cause to search petitioner and *could have* secured a warrant. *Id.* at 35a-46a.

2. The Minnesota Supreme Court in turn repudiated the appellate court's reasoning as "contrary to basic principles of Fourth Amendment law" because "[a] warrantless search is generally unreasonable, unless it falls into one of the recognized exceptions to the warrant requirement." App., *infra*, 7a. But, in a divided ruling, the court below nevertheless held application of the state test-refusal law constitutional, reasoning that "a warrantless breath test of [petitioner] would not have violated the Fourth Amendment because it is a search incident to [petitioner's] valid arrest." *Id.* at 9a.

In reaching this conclusion, the court acknowledged both that "the State in this case cannot show that a search of [petitioner's] breath was related to officer safety or concerns that [petitioner] would destroy evidence," and that this Court "has required ei-

ther a concern for officer safety or a concern over the preservation of evidence to support the constitutionality of a warrantless search of the area where the defendant was arrested or a search of items near the defendant." App., *infra*, 11a, 12a & n.7. But the Minnesota court held that these considerations have no bearing on the permissibility of a search incident to arrest when a warrantless search concerns, not the "area" or "items" near the defendant, but "the *body* of a person validly arrested." *Id.* at 12a (emphasis added).

The court believed that this conclusion follows from what it characterized as this Court's holding in *United States* v. *Robinson*, 414 U.S. 218 (1973), that "a warrantless search of a person was categorically reasonable under the Fourth Amendment as a search incident to that person's valid arrest." App., *infra*, 13a. And the court below opined that this rule was reaffirmed in *Riley* v. *California*, 134 S. Ct. 2473 (2014), which it understood to permit a broader search of "the person of an arrestee" than of the "area where the defendant was arrested" or of "items near the defendant." App, *infra*, 15a, 11a-12a. Accordingly, the Minnesota court held that "a warrantless breath test of [petitioner] would have been constitutional under the search-incident-to-arrest exception to the Fourth Amendment's warrant requirement." *Id.* at 19a. And that conclusion, the court found, disposed of petitioner's appeal because petitioner "does not have a fundamental right to refuse a constitutional search." *Id.* at 20a.

3. Justices Page and Stras issued a joint dissent. Criticizing the majority for "a decision that is as notable for its disregard of Supreme Court precedent as it is for its defective logic," the dissent pointed to

"[t]wo erroneous assumptions [that] permeate the court's analysis." App., *infra*, 23a.

First, the dissent noted that this Court "has never implied, must less stated, that the search-incident-to-arrest exception extends to the forcible removal of substances from within a person's body." App., *infra*, 23a. Any doubt about this, the dissent continued, "vanished after" this Court's decision in *Riley*; "[g]iven *Riley*'s clarification that *Robinson* [which approved a search of a cigarette package in an arrestee's pocket] applies only to physical evidence found on a person's body—and not digital content found on cell phones—the only logical conclusion is that the removal of breath (or blood or urine) from the body to discover an arrestee's blood alcohol level is not part of a search incident to arrest." *Id.* at 25a, 26a. In the dissent's view, "[i]t seems obvious that, similar to the digital content of a cell phone, alveolar 'deep-lung' air 'differ[s] in both a quantitative and a qualitative sense from other objects that might be kept on an arrestee's person." *Id.* at 27a (quoting *Riley*, 134 S. Ct. at 2489). The dissent added that "[t]ypically, a person taking a breath test must insert a tube into his or her mouth and then comply with the officer's instructions to blow into the tube at a specified rate until the breathalyzer had had sufficient time to analyze a sample of deep-lung air" (*Id.* at 28a), and the majority "does not cite a single Supreme Court case authorizing such a profound intrusion *into* a person's bodily integrity during a search incident to arrest." *Ibid.*

The dissent also challenged the majority's "equally extreme" holding that "the rationales for the search-incident-to-arrest exception—officer safety and preventing the destruction of evidence—do not

apply to searches of a person." App., *infra*, 29a. In the dissent's view, "neither *Robinson* nor *Riley* rejected [those] rationales as bookends for the circumstances under which the search-incident-to-arrest exception applies." *Id.* at 30a. Indeed, the dissent continued, "[t[he *only* justification for allowing police to conduct a warrantless breath test is the preservation of evidence due to the natural dissipation of alcohol from a person's bloodstream. In *McNeely*, however, the Supreme Court specifically rejected the proposition that the natural metabolization of alcohol constitutes a *per se* exigency justifying a warrantless blood test." *Id.* at 31a. And "[i]t strains credulity to suppose that, after the Supreme Court carefully examined the exigent-circumstances exception in *McNeely*, it would conclude in some future case that the search [in that case] would have been justified anyway under the search-incident-to-arrest doctrine, which according to *Chimel* [v. *California*, 395 U.S. 752 (1969)] and *Riley* turns on the same rationale regarding the preservation of evidence that the Supreme Court explicitly rejected in *McNeely*." App., *infra*, 32a.

In this setting, and because, under *Camara* v. *Municipal Court of San Francisco*, 387 U.S. 523 (1967), "a state cannot criminalize the refusal to consent to an illegal warrantless search," the dissent concluded that "the State may not constitutionally convict persons who exercise their 'constitutional right to insist that [police] obtain a warrant.'" App., *infra*, 33a, 34a (quoting *Camara*, 387 U.S. at 540 (bracketed material added by the court)).

4. The court below subsequently denied a petition for rehearing, while noting that "members of the court disagree about the effect of" this Court's deci-

sion in *McNeely* and *Schmerber* v. *California*, 384 U.S. 757 (1966)." App., *infra*, 62a.

REASONS FOR GRANTING THE PETITION

There can be no denying that the issue presented here is one of great importance. As the dissent below recognized (and the majority did not deny), the Minnesota Supreme Court's holding "nullifies the warrant requirement in nearly every drunk-driving case" (App., *infra*, 22a); as a practical matter, that reads this Court's *McNeely* decision off the books. The decision below also imposes an indefensible limit on the search-incident-to-arrest exception—a matter of great importance in its own right, as "warrantless searches incident to arrest occur with far greater frequency than searches conducted pursuant to a warrant." *Riley*, 134 S. Ct. at 2482. And that holding, which gives greater Fourth Amendment protection to the place where a person is standing than to the person's body, surely is wrong: "The Fourth Amendment lists 'persons' *first* among the entities protected against unreasonable searches and seizures." *Maryland* v. *King*, 133 S. Ct. 1958, 1982 (2013) (Scalia, J., dissenting) (emphasis in original). Consequently, the holding below should not stand.

A. Because a breath test is not administered to further officer safety or preserve evidence, it is not a valid search incident to arrest.

The court below recognized that criminalizing the refusal to submit to a search could be constitutional only if the requested search itself satisfies the Fourth Amendment's requirements. The court believed that condition to be satisfied here, however, because it understood this Court's decisions in *Riley*

and *Robinson* to hold that *any* search of an arrestee's person is a valid search incident to arrest. That holding was premised on a plain misunderstanding of this Court's decisions.

1. The search-incident-to-arrest exception does not per se *apply to all searches of the person.*

a. This Court has made clear time and again that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment." *Arizona* v. *Gant*, 556 U.S. 332, 338 (2009) (quoting *Katz* v. *United States*, 389 U.S. 347, 357 (1967)). This fundamental rule is "subject only to a few specifically established and well-delineated exceptions." *Ibid.* This case concerns the nature of one of these exceptions, that for "a warrantless search incident to a lawful arrest." *Riley*, 134 S. Ct. at 2482.

Under the search-incident-to-arrest exception, this Court has held permissible (1) searches of the person of the arrestee and (2) searches of the area within the control of the arrestee. *Riley*, 134 S. Ct. at 2483; *Robinson*, 414 U.S. at 224. In both circumstances, however, the Court has been very clear on the exception's rationale. First, "[w]hen an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape." *Chimel* v. *California*, 395 U.S. 752, 762-63 (1969). And second, an arresting officer may "search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction." *Id.* at 763. These two *Chimel* rationales "ensure[] that the scope of a search incident to arrest is commensurate with its

purposes of protecting arresting officers and safeguarding any evidence of the offense of arrest that an arrestee might conceal or destroy." *Gant*, 556 U.S. at 339. The Court repeatedly has reaffirmed the limits on the search-incident-to arrest exception stated in *Chimel*, which "laid the groundwork for most of the existing search incident to arrest doctrine." *Riley*, 134 S. Ct. at 2483. *See Robinson*, 414 U.S. at 235; *Gant*, 556 U.S. at 338.

b. The court below acknowledged that these rationales limit the scope of the search-incident-to-arrest exception as it applies to the search of the "*area* where the defendant was arrested or a search of *items* near the defendant." App., *infra*, 12a. And the court recognized that "the State in this case cannot show that a search of [petitioner's] breath was related to officer safety or concerns that he would destroy evidence." *Id.* at 11a & n.7.[1] Yet the court below held that the search-incident-to-arrest exception nevertheless applies because the majority believed that the limitations described by this Court in *Riley*, *Gant*, *Robinson*, and *Chimel* do not apply to "the warrantless search of the *body* of a person validly arrested." App., *infra*, 12a (emphasis added). Thus, un-

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[1] The rationales underlying the search-incident-to-arrest exception do not apply to chemical alcohol tests generally. As this Court recognized in *McNeely*, blood alcohol content dissipates at a steady, predictable rate—and, in any event, dissipation is wholly beyond the control of a person in custody. The concern about destuction of evidence therefore cannot, without more, justify the search of a person's deep-lung air. Nor is the officer-safety rationale relevant. Just like the digital cell phone data at issue in *Riley*, a person's breath "cannot itself be used as a weapon to harm an arresting officer or to effectuate the arrestee's escape." *Id.* at 2485.

der the holding below, searches of an arrestee's body do not require *any* justification if they are associated with an arrest.

This holding can fairly be said to turn Fourth Amendment doctrine on its head, and simply cannot be reconciled with this Court's decisions. "No right is held more sacred, or is more carefully guarded, * * * than the right of every individual to the possession and control of his *own person*, free from all restraint or interference of others, unless by clear and unquestionable authority of law." *Terry* v. *Ohio*, 392 U.S. 1, 9 (1968) (emphasis added). For this reason, the *Chimel* rationales apply both to property found on or near the arrestee *and* to the person of the arrestee. Although the court below believed otherwise, that seemingly self-evident point was affirmed in *all* of this Court's search-incident-to-arrest decisions: as the Court explained in *Riley*, in *Robinson* "the Court *applied* the *Chimel* analysis in the context of a search of the arrestee's person." 134 S. Ct. at 2483 (emphasis added); see *id.* at 2484 ("*Gant*, like *Robinson*, recognized that the *Chimel* concerns for officer safety and evidence preservation underlie the search incident to arrest exception"). The majority below cited no decision of this Court that authorized *per se* searches incident to arrest inside a person's body; as the dissenters explained, "[t]he reason is that no such case exists." App., *infra*, 28a.

That necessarily is so. It would be perverse to suggest that a greater degree of justification is required for a search of an arrestee's *property* and of the area surrounding him than for a search inside the arrestee's *body*. After all, "the Fourth Amendment protects people, not places." *Katz*, 389 U.S. at 351. This Court has repeatedly stressed "the unique,

significantly heightened protection afforded against searches of one's person." *Wyoming* v. *Houghton*, 526 U.S. 295, 303 (1999); see *King*, 133 S. Ct. at 1969 ("Virtually any intrusio[n] into the human body * * * will work an invasion of cherished personal security * * * * *"). For that reason, the Court held in *Schmerber* that the rationales for a search incident to arrest "have little applicability with respect to searches involving intrusions beyond the body's surface," as "[t]he interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that desired evidence might be obtained." 384 U.S. at 769-70. The contrary rationale adopted below is plainly wrong.

In nevertheless holding that the search-incident-to-arrest exception applies here, the court below relied on the statement in *Robinson* (repeated in *Riley*) that searches of a person incident to arrest are permitted "regardless of 'the probability in a particular arrest situation that weapons or evidence would in fact be found.'" 134 S. Ct. at 2485 (quoting 414 U.S. at 235); see App., *infra*, 14a. But the court below missed this Court's point. Exceptions to the warrant requirement "do not require an assessment of whether the policy justifications underlying the exception * * * are implicated in *a particular case*." *McNeely*, 133 S. Ct. at 1559 n.3 (emphasis added). But this does not mean that *any* search of a person is automatically reasonable under the search-incident-to-arrest exception. Rather, the Court "ask[s] * * * whether application of the search incident to arrest doctrine to this particular *category* of [search] would 'untether the rule from the justifications underlying the *Chimel* exception.'" *Riley*, 134 S. Ct. at 2485 (quoting *Gant*, 556 U.S. at 343) (emphasis added). The necessary connection existed in *Robinson*, where

the "unknown physical objects" concealed in Robinson's cigarette pack "pose[d] risks, no matter how slight, during the tense atmosphere of a custodial arrest." *Riley*, 134 S. Ct. at 2485. But in sharp contrast, the breath test at issue here (like the search of cell phone data at issue in *Riley* (see *id.* at 2485-2488))—which concededly *never* could have bearing either on officer safety or on evidence preservation—is a category of search that has *no* connection to the *Chimel* justifications.

c. In addition, as the dissent below recognized, the Minnesota Supreme Court's decision effectively vitiates this Court's holding in *McNeely*. The *McNeely* Court expressly disapproved a *per se* rule permitting blood alcohol tests under the exigent circumstances exception to the warrant requirement. 133 S. Ct. at 1563. That holding was a natural application of this Court's determination that "for the most part *per se* rules are inappropriate in the Fourth Amendment context." *United States* v. *Drayton*, 536 U.S. 194, 201 (2002). Yet the defendant in *McNeely* was arrested prior to being subjected to a warrantless blood draw. 133 S. Ct. at 1556-57. Accordingly, under the Minnesota Supreme Court's rule the officers in *McNeely* could have avoided the totality-of-the-circumstances inquiry required by this Court's *McNeely* decision simply by treating the alcohol test sought in that case as a search incident to arrest. This approach "nullifies the warrant requirement in nearly every drunk-driving case." App., *infra*, 22a.

d. The court below also attempted to support its holding by pointing to what it described as the "less-invasive nature of breath testing" (App., *infra*, 11a n.6), which it contrasted with blood or urine tests.

That reasoning, however, rested on a misreading of this Court's precedents that dangerously expands officers' ability to conduct searches inside an arrestee's body.

This Court has explicitly held that breath tests are searches for Fourth Amendment purposes. *Skinner* v. *Ry. Labor Execs.' Ass'n.*, 489 U.S. 602, 616-17 (1989); *see McNeely*, 133 S. Ct. at 1569. And although the reduced privacy interests of an arrestee have some bearing on application of the search-incident-to-arrest exception (see *Riley*, 134 S. Ct. at 2488-89), a breath test of the sort at issue here is "a profound intrusion *into* a person's bodily integrity." App., *infra*, 28a (Page and Stras, JJ., dissenting). Such a test does not capture an ordinary breath of the kind that routinely is exposed to the public. Instead, it "requires a sample of 'alveolar' (deep lung) air; to assure that such a sample is obtained, the subject is required to blow air into the [breathalyzer] at a constant pressure for a period of several seconds." *California* v. *Trombetta*, 467 U.S. 479, 481 (1984).

The Datamaster, Minnesota's current breath test device, operates in this manner. To obtain a breath sample, an officer must "[i]nsert a mouthpiece and instruct the subject to provide a long and steady sample." David Eden et al., *Datamaster DMT Breath Test Operator Training Course Manual*, Minn. Dep't of Pub. Safety, 51 (Nov. 5, 2013), https://goo.gl/nQck7R. The DMT requires at least 1.5 liters of air, provided "in a single exhalation" at a rate of 3.0 liters per minute or greater. *Ibid.* "If the subject stops blowing before the instrument notes a uniformity of concentration (deep lung or alveolar air), the breath sample will not be accepted." *Id.* at 23. Because of the intrusive nature of this testing regime,

"[s]ubjecting a person to a breathalyzer test, * * * implicates similar concerns" "about bodily integrity" to blood tests. *Skinner*, 489 U.S. at 616-17. In terms of its interference with personal privacy and dignity interests, such a test is a very far cry from permissible examination of a "zipper bag," "billfold," "wallet," or "purse." *Riley*, 134 S. Ct. at 2488.

Additionally, "[i]n evaluating the reasonableness of police procedures under the Fourth Amendment," this Court "look[s] to prevailing rules in individual jurisdictions." *Tennessee* v. *Garner*, 471 U.S. 1, 15-16 (1985). The Court thus found it notable in *McNeely* "that a majority of States either place significant restrictions on when police officers may obtain a blood sample despite a suspect's refusal * * * or prohibit nonconsensual blood tests altogether." *McNeely*, 133 S. Ct. at 1566 & n.9 (plurality opinion) (internal quotation marks omitted). Though not dispositive, the "wide-spread state restrictions on nonconsensual blood testing provide[d] further support for [this Court's] recognition that compelled blood draws implicate a significant privacy interest." *Id.* at 1567 (internal quotation marks omitted). And here as well, nearly all of the States that place restrictions on nonconsensual blood tests impose the same restrictions on nonconsensual breath tests.[2] This pro-

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[2] See Ala. Code § 32-5-192(a), (c) (2014); Alaska Stat. §§ 28.35.032(a), 28.35.035(a) (2014); Ariz. Rev. Stat. § 28-1321(D)(1); Ark. Code §§ 5-65-205(a)(1), 5-65-208(a)(1) (nonrelevant amendments enacted by 2015 Arkansas Laws Act 299); Conn. Gen. Stat. §§ 14-227b(b), 14-227c(b) (2014); Ga. Code § 40-5-67.1(d); Haw. Rev. Stat. § 291E-15 (2014); Iowa Code §§ 321J.6(1), 321J.9(1) (2014); Ky. Rev. Stat. § 189A.105(2)(b); La. Rev. Stat. § 32.666(A)(1)(a)(i), (2) (2014); Md. Transp. Code § 16-205.1(b)(i)(1), (c)(1); Mass. Gen. Laws, ch. 90, § 24(1)(e), (f)(1); Mich. Comp. Laws § 257.625d(1); Miss. Code § 63-11-21;

vides strong evidence that breath tests, like blood tests, are understood to implicate significant privacy interests.

Against this background, the Court has suggested that warrantless breath tests are *per se* reasonable only "when special needs, *beyond the normal need for law enforcement*, make the warrant and probable-cause requirement impracticable." *Skinner*, 489 U.S. at 619 (emphasis added) (internal quotation marks omitted). In *Skinner*, for instance, the highly regulated nature of the railroad industry, the need to keep both the regulated train operators themselves and their passengers safe, and especially the fact that the tests in that case were conducted not for prosecutorial purposes but rather to prevent accidents, all combined to create a compelling "special need" for testing. *Id.* at 620-621. But the Court recognized that "the privacy interests implicated by the toxicological testing at issue reasonably might be viewed as significant in other contexts" (*id.* at 628)—as they are in this one.

In the context of traffic stops, there are no "special needs" that justify warrantless breath tests. This Court has already determined that the natural dissipation of alcohol from blood does not, by itself, render the warrant requirement inapplicable. *McNeely*, 133

Mont. Code § 61-8-402(4), (5) (2014); Neb. Rev. Stat. § 60-498.01(2); N.H. Rev. Stat. § 265-A:14(I); N.M. Stat. § 66-8-111(A); N.Y. Veh. & Traf. Law §§ 1194(2)(b)(1), 1194(3); N.D. Cent. Code § 39-20-01.1(1); Okla. Stat., Tit. 47, § 753; Ore. Rev. Stat. § 813.100(2); 75 Pa. Cons. Stat. § 1547(b)(1) (2014); R.I. Gen. Laws §§ 31-27-2.1(b), 31–27–2.9(a); S.C. Code § 56-5-2950(B); Tex. Transp. Code §§ 724.012(b), 724.013; Vt. Stat., Tit. 23, § 1202(b), (f); Wash. Rev. Code. § 46.20.308(2)–(4); W. Va. Code §§ 17C-5-4(b), 17C-5-7; Wyo. Stat. § 31-6-102(d).

S. Ct. at 1568. And the test is given in this setting *only* as an element of "the normal need for law enforcement." There is, as a consequence, no justification for abrogation of the warrant requirement.

2. Because the proposed underlying search would be unconstitutional, Minnesota's test-refusal statute—which criminalizes refusal to submit to an unconstitutional search—also is unconstitutional.

Because the court below hinged its holding that Minnesota's test-refusal statute could be constitutionally applied on its belief that a breath test was justified by the search-incident-to-arrest exception, the holding must fall if that exception is inapplicable. It is fundamental that government may not criminalize a person's refusal to submit to an unconstitutional search—that is, a search that is unsupported by a warrant or a valid exception to the Fourth Amendment's warrant requirement. See *Camara*, 387 U.S. at 540; see also *See* v. *City of Seattle*, 387 U.S. 541 (1967) (companion case).

In *Camara*, a San Francisco city ordinance authorized city employees "upon presentation of proper credentials" to enter any building in the city. 387 U.S. at 526. A property owner was convicted of a crime for violating this ordinance by refusing to permit warrantless inspection of his apartment. Applying basic Fourth Amendment principles, this Court held that the owner "had a constitutional right to insist that the inspectors obtain a warrant to search" and that he "may not constitutionally be convicted for refusing to consent to the inspection." *Id.* at 540.

That principle applies fully here. Petitioner may not constitutionally be convicted for refusing to sub-

mit to a breath test unsupported by a warrant or a valid warrant exception. If anything, the Fourth Amendment interests at stake here are more vital than they were in *Camara*, which involved routine building inspections rather than searches by police officers as an element of a criminal investigation. Such searches plainly impinge on the "historic interests of 'self-protection'" at the core of the protections of the Fourth Amendment. *Camara*, 387 U.S. at 530 (citing *Boyd* v. *United States*, 116 U.S. 616 (1886)).[3]

3. Minnesota's statute may not be upheld on the alternative ground that implied-consent statutes are per se *reasonable or establish* actual *consent.*

The court below did *not* seek to justify the Minnesota regime on the theory that it is *per se* reasonable (the view of the state appellate court) or that Minnesota's recognition of deemed "consent" means that drivers *actually* consent to breath testing. That is for good reason: these sorts of rationales—which have been accepted by some other courts—are insupportable.

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[3] Although *Camara* involved a suspicionless search rather than one based on probable cause, what made the search defective was the lack of a warrant or other equivalent justification; the Court took issue with the search not because it was suspicionless but because it was warrantless. Indeed, the Court in *Camara* overruled a prior decision, *Frank* v. *Maryland*, 359 U.S. 360 (1959), despite the fact that the ordinance upheld in *Frank* required the inspector to "have cause to suspect" a violation before demanding entry without a warrant. *Camara*, 387 U.S. at 530 (citing *Frank*, 364 U.S. at 264, 265). By its own terms, then, *Camara* applies whether or not the State had cause to initiate the search.

For example, in *State* v. *Birchfield*, 858 N.W.2d 302, 2010 (N.D. 2015), cert. pending, No. 14-____ (filed June 12, 2015), the North Dakota Supreme Court held that a criminal test-refusal statute is "reasonable because it is an efficient tool in discouraging drunk-driving." 858 N.W.2d 302, 310 (N.D. 2015). On balance, the court reasoned, the State's interest in reducing drunk driving outweighs the intrusion on the searched individual's privacy. *Id.* at 309. In addition, the North Dakota court reasoned that entitlement to drive may be conditioned on the driver's agreement to consent to a chemical test and that the "unconstitutional conditions doctrine" is not implicated where, as here, the State merely "criminalizes the refusal to submit to a chemical test but does not authorize a warrantless search." *Id.* at 308. The court added that "the giving of the implied consent advisory informing the arrestee that refusing a chemical test is a crime does not render consent to the test involuntary." *Id.* at 310. See also, *e.g.*, *State* v. *Washburn*, 2015 WL 630868 (N.D. 2015); *Williams* v. *State*, 2015 WL 3511222, at *8-9 (Fla. Dist. Ct. App. 2015). But that analysis cannot be squared with this Court's holdings, for two reasons.

First, by relying on the "general reasonableness" of implied consent statutes as a matter of public policy, these courts depart from the principle of individualized assessment that lies at the core of Fourth Amendment doctrine. Only in extraordinary circumstances may public officials employ sweeping warrantless searches. See *Skinner*, 489 U.S. at 619. Yet a routine DUI investigation, like the one in this case, is among the most ordinary of law enforcement functions and must be analyzed according to traditional Fourth Amendment principles, which preclude an "overly broad categorical approach * * * in a context

where significant privacy interests are at stake." *McNeely*, 133 S. Ct. at 1564. It is for this reason that the court below properly repudiated the reasoning of the Minnesota Court of Appeals.

This context, moreover, is one where a warrant serves a clear and essential purpose. The application of blood alcohol tests plainly is "subject to the judgment of officers whose perspective might be colored by their primary involvement in the often competitive enterprise of ferreting out crime." *King*, 133 S. Ct. at 1970 (citations and internal quotation marks omitted). Thus, under the Minnesota and North Dakota statutes, the officer in the field has complete discretion both as to both whether a test is administered at all and, if one is administered, whether the test is to be of breath, blood, or urine. This is the paradigmatic situation where "discretion * * * could properly be limited by the 'interpo[lation of] a neutral magistrate between the citizen and the law enforcement officer.'" *King*, 133 S. Ct. at 1969 (citation omitted; bracketed material added by the Court).

Second, the fiction of driver consent cannot support the warrantless search proposed here. Prior to the decision in *McNeely*, some courts accepted the argument that an implied-consent statute could function as an independent exception to the warrant requirement.[4] A common theme of these decisions was that driving is a privilege and that drivers consent in advance to warrantless chemical tests in re-

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[4] See *State* v. *Wells*, 2014 WL 4977356, at *6-8 (Tenn. Crim. App. 2014) (collecting cases); *Aviles* v. *State*, 385 S.W.3d 110 (Tex. App. 2012), cert. granted, judgment vacated and remanded for consideration in light of *McNeely*, 134 S. Ct. 902 (2014).

turn for the grant of this privilege. See, *e.g.*, *State v. Janosky*, 2000 WL 1449367 (Tenn. Crim. App. 2000).

After *McNeely*, however, "[t]he vast majority of courts have found that statutory implied consent is not equivalent to Fourth Amendment consent." *Williams*, 2015 WL 3511222, at *5 & n.4 (citing cases). These courts have recognized that "an implied consent statute * * * does not justify a warrantless blood draw from a driver who refuses to consent[] * * * or objects to the blood draw * * *. Consent to a search must be voluntary. * * * Inherent in the requirement that consent be voluntary is the right of the person to withdraw that consent." *State* v. *Halseth*, 339 P.3d 368, 371 (Idaho 2014).[5]

That conclusion surely is correct: "allowing implied-consent statutes to constitute a per se, categorical exception to the warrant requirement would make a mockery of the many precedential Supreme Court cases that hold that voluntariness must be determined based on the totality of the circumstances." *Williams*, 2015 WL 3511222, at *6. It also "would de-

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[5] See *State* v. *Butler*, 302 P.3d 609, 613 (Ariz. 2013); *Flonnory* v. *State*, 2015 WL 374879, at *4 (Del. 2015) (unpublished); *Byars* v. *State*, 336 P.3d 939, 945-946 (Nev. 2014) (striking down a provision of the State's implied consent law on the ground that the statute could not by itself authorize a warrantless blood draw); *State* v. *Arrotta*, 339 P.3d 1177, 1178 (Idaho 2014); *State* v. *Wulff*, 337 P.3d 575, 582 (Idaho 2014); *State* v. *Fierro*, 853 N.W.2d 235, 241 (S.D. 2014); *Reeder* v. *State*, 428 S.W.3d 924, 930 (Tex. App. 2014); *State* v. *Declerck*, 317 P.3d 794, 804 (Kan. Ct. App. 2014); *United States* v. *Brown*, 2013 WL 5604589, at *4 & n.1 (D. Md. 2013). But see *State* v. *Yong Shik Won*, 332 P.3d 661, 681 n. 23 (Haw. Ct. App. 2014) ("In effect, by exercising the privilege of driving, a driver (like Won) consents to submit to a breath test.").

vour the *McNeely* rule and contradict *McNeely*'s general reasoning that these cases must be decided using a totality-of-the-circumstances approach." *Id.*

Moreover, the notion that a driver "consents" to a warrantless unjustified search in return for the privilege of driving would violate the doctrine of unconstitutional conditions, at least when the driver is unable to revoke that consent free of criminal penalty. As noted above, individuals have a Fourth Amendment right to refuse to permit an illegal warrantless search under the rule of *Camara*. Test-refusal statutes violate the doctrine of unconstitutional conditions insofar as they condition the privilege of driving on the surrender of that right.

The "unconstitutional conditions doctrine * * * vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up." *Koontz* v. *St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2594 (2013). Thus, the "'government may not grant a benefit on the condition that the beneficiary surrender a constitutional right.'" *Amelkin* v. *McClure*, 330 F.3d 822, 827-828 (6th Cir. 2003) (quoting Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413, 1415 (1989)); see also Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 Harv. L. Rev. 4, 67 (1988) ("In its canonical form, this doctrine holds that even if a state has absolute discretion to grant or deny a privilege or benefit, it cannot grant the privilege subject to conditions that improperly 'coerce,' 'pressure,' or 'induce' the waiver of constitutional rights.") As this Court has long recognized, it would be a "palpable incongruity" to strike down a legislative act that expressly divests a person of rights guaranteed by the Consti-

tution, but to uphold an act "by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold." *Frost & Frost Trucking Co.* v. *Railroad Comm'n*, 271 U.S. 583, 593 (1926).

In States like Minnesota and North Dakota, citizens must either abstain from driving or "consent" in advance to heavy criminal penalties if they later refuse a chemical test—even if that test is unsupported by a warrant or a recognized exception to the warrant requirement. Like a city that uses its monopoly on zoning licenses to impose unconstitutional conditions on homeowners, these states use their monopoly on driver's licenses to coerce the surrender of constitutional rights. And unlike some government benefits, driving is a necessity for millions of people who cannot earn a livelihood or participate meaningfully in society without it.[6] Cf. *Lebron* v. *Sec'y, Florida Dep't of Children & Families*, 710 F.3d 1202, 1214-15 (11th Cir. 2013) (holding that Florida could not mandate "consent" to warrantless drug testing for welfare applicants because this forced them to choose between exercising Fourth Amendment rights and receiving financial assistance).[7] This regime plainly

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[6] The U.S. Census Bureau estimates that 86.1% of American workers—more than 100 million people—commute to work by car, truck, or van. U.S. Census Bureau, Commuting in the United States: 2009, http://perma.cc/4N9Y-8LBR.

[7] In response to this argument, some courts rely on *South Dakota* v. *Neville*, 459 U.S. 553, 560 (1983), in which this Court upheld a test-refusal statute against a Fifth Amendment challenge. See, e.g., *State v. Brooks*, 838 N.W.2d 563 (Minn. 2013); *State* v. *Johnson*, 2014 WL 2565771, at *4 (Minn. Ct. App. 2014). In *Neville*, South Dakota law provided that a driver's re-

is coercive—and "[w]here there is coercion, there cannot be consent." *Bumper* v. *North Carolina*, 391 U.S. 543, 550 (1968). Accordingly, the implied consent rationale endorsed in *Birchfield*, and properly rejected by many other courts, cannot support the holding below.

B. State and federal courts are split over whether chemical alcohol tests constitute reasonable searches incident to arrest.

In addition, the holding below departs from more than this Court's doctrine; it also contributes to a conflict in the lower courts on whether the search-incident-to-arrest exception justifies warrantless chemical tests in DUI cases.

As the Minnesota Supreme Court recognized (App., *infra*, 9a-10a), a number of federal and state courts have upheld blood alcohol tests under the

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fusal to take a chemical test could be introduced as evidence against him at trial; the defendant argued that this violated his right against self-incrimination. The Court found that the statute fell short of the "physical or moral compulsion" necessary to produce an infringement of the Fifth Amendment. *Id.* at 562. But the test-refusal statute at issue in *Neville* was not as coercive as Minnesota's; it provided only for an adverse jury inference, without imposing independent criminal penalties. Moreover, as the *Neville* Court was careful to note, "the fact the government gives a defendant or suspect a 'choice' does not always resolve the compulsion inquiry" because, depending upon the circumstances, a government-imposed choice may result in a "cruel [di]lemma." *Id.* at 563. That surely is the case here, where refusal to submit to the test makes a person guilty of a criminal offense—and subject to very onerous criminal penalties, possibly including a mandatory, multi-year prison sentence—whether or not the person in fact committed the separate offense of driving while impaired.

search-incident-to-arrest exception, including the Fourth, Eighth, Ninth, and Eleventh Circuits and courts in Alaska, Ohio, Oregon, Pennsylvania, and Wisconsin.[8] Although a few of these decisions based their holdings on the possibility of destruction of evidence (see *Dodd*, 623 F.3d at 568; *Reid*, 929 F.2d at 994; *Wing*, 268 P.3d at 1110; and *Seibel*, 471 N.W.2d at 233), the rest adopted the same *per se* rule as did the court below. See *Burnett*, 806 F.2d at 1450; *Byrd*, 783 F.2d at 1005; *Wing*, 268 P.3d at 1110; *Hill*, 2009 WL 1485026, at *5; *McClure*, 335 P.3d at 1263; and *McFarren*, 525 A.2d at 1188.

Other courts, however, have determined that chemical alcohol tests may *not* be justified by the search-incident-to-arrest doctrine. These include the Sixth Circuit (see *United States* v. *Berry*, 866 F.2d 887, 891 (6th Cir. 1989) ("The rationale for a search incident to arrest exception does not directly support the taking of a blood test without the suspect's consent.")), and the highest available reviewing courts of Maine (see *State* v. *Baker*, 502 A.2d 489, 492 (Me. 1985) (finding that this Court has "reject[ed] the doctrine of search incident to arrest as a sufficient basis for the taking of an involuntary blood test")); Mis-

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[8] See *United States* v. *Reid*, 929 F.2d 990, 994 (4th Cir. 1991); *Dodd* v. *Jones*, 623 F.3d 563, 568 (8th Cir. 2010); *Burnett* v. *Municipality of Anchorage*, 806 F.2d 1447, 1450 (9th Cir. 1986); *Byrd* v. *Clark*, 783 F.2d 1002, 1005 (11th Cir. 1986), abrogated in part on other grounds by *Nolin* v. *Isbell*, 207 F.3d 1253 (11th Cir. 2000); *Wing* v. *State*, 268 P.3d 1105, 1110 (Alaska Ct. App. 2012); *State* v. *Hill*, 2009 WL 1485026, at *5 (Ohio Ct. App. 2009); *State* v. *McClure*, 335 P.3d 1260, 1263 (Or. 2014) (en banc); *Commonwealth Dep't of Transp.* v. *McFarren*, 525 A.2d 1185, 1188 (Pa. 1987); *State* v. *Seibel*, 471 N.W.2d 226, 233 (Wis. 1991).

souri (see *State* v. *McNeely*, 358 S.W.3d 65, 72 n.5 (Mo. 2012) (en banc), aff'd, 133 S. Ct. 1552 (2013) ("To the extent that [previous cases] interpret *Schmerber* to allow a nonconsensual warrantless blood draw incident to arrest in DWI cases without other exigent circumstances, they are no longer to be followed.")); New Hampshire (see *State* v. *Stern*, 846 A.2d 64, 68 (N.H. 2004) (ruling on state constitutional grounds but citing *State* v. *Wong*, 486 A.2d 262 (N.H. 1984), which the court noted was "decided under federal law") ("To be constitutional, the exigent circumstances exception to the warrant requirement must apply.")); North Carolina (*State* v. *Welch*, 342 S.E.2d 789, 794 (N.C. 1986) (blood draws require warrant "unless probable cause and exigent circumstances exist")); and Texas (see *State* v. *Villarreal*, 2014 WL 6734178, at *15 (Tex. Crim. App. 2014), reh'g granted (Feb. 25, 2015) ("[T]he search-incident-to-arrest exception is inapplicable [to blood tests].")).[9] See also *Williams*, 2015 WL 3511222, at *7 ("breath-alcohol tests are not justified by either of the rationales for the [search-incident-to-arrest] exception").

The court below noted some of these contrary holdings but distinguished them as applying to blood tests rather than breath tests, finding the differences between the two sorts of test to be "material." App., *infra*, 10a-11a n.6. The conflicting decisions, however, cannot be explained away in this manner. First, as discussed above, this Court's decisions show that

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[9] Although rehearing has been granted in *Villarreal*, Texas's petition for rehearing did not question the court's holding on the search-incident-to-arrest doctrine. See generally Petitioner's Amended Motion for Rehearing, *Villarreal*, No. PD-1306-14 (Tex. Crim. App. Dec. 19, 2014), available at http://goo.gl/RTMtgo.

breath tests, like blood tests, are significant invasions of privacy that must be limited by the Fourth Amendment; as we also have shown, most States treat blood and breath tests equivalently in this context, which is compelling evidence that the privacy interests at stake are equivalent. Second, nothing in the rationale of the Minnesota Supreme Court's decision prevents it from applying to blood tests. The court based its holding on the view that *all* searches of the person—including searches *inside* the body—are *per se* reasonable searches incident to arrest. Thus, although the court below observed that "the question of a blood or urine test incident to arrest is not before us" (*ibid*), nothing in its rationale is affected by the nature of the test. The court's logic creates an inexorable conflict with the rulings of other state and federal courts.[10]

C. The question presented is one of substantial and recurring importance.

The decision below accordingly departs from this Court's rulings and is in great tension with the holdings of other state and federal courts; that is reason enough for the Court to grant review. And the need for review is especially acute because the question presented in this case is one of exceptional practical

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[10] Indeed, other courts, like the North Dakota Supreme Court in *Birchfield*, have upheld the constitutionality of a test-refusal statute in the specific context of a requested blood test, albeit on a general reasonableness or implied consent rationale. See *Birchfield* Pet., at 4. It therefore is imperative that the Court settle the constitutionality of required tests in both contexts. For this reason, it would be appropriate for the Court to grant review both in this case and in *Birchfield*, so that it is presented with broadest range of rationales offered in defense of these laws and of factual contexts in which they apply.

and doctrinal importance. Thirteen States have statutes like Minnesota's that criminalize a driver's refusal to consent to a blood alcohol test.[11] These statutes affect many thousands of people every year.

Although nationwide statistics are unavailable, a report of the National Highway Traffic Safety Administraion tracked the number of convictions for test refusal at the county level. Ramsey County, Minnesota—a county with a population of about 500,000 people—reported over 1300 convictions for criminal test refusal over a three-year period. Nat'l Highway Traffic Safety Admin., Dep't of Transp., Traffic Safety Facts, Breath Test Refusals and Their Effect on DWI Prosecutions, DOT HS 811 551 (2012). Omaha, Nebraska—a city with a population of about 400,000—reported over 1200 convictions for criminal test refusal between 2004 and 2006. *Id.* Nationwide, it is certain that tens, and perhaps hundreds, of thousands of people are subjected to criminal penalties under these statutes every year—and if the arguments presented here are correct, the federal constitutional rights of all of these people are being infringed.

Moreover, there is considerable uncertainty about the constitutional rules that govern in this area, as the sharp division on the court below illustrates. As we have shown, courts upholding com-

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[11] Alaska (Alaska Stat. § 28.35.032); Florida (Fla. Stat. 316.1932); Hawaii (Haw. Rev. Stat. § 291e-68); Indiana (IC § 9-30-7-1); Kansas (Kan. Stat. § 8-1025); Louisiana (R.S. § 661(C)(1)(f)); Minnesota (Minn. Stat. § 169A.20); Nebraska (Neb. Rev. Stat. §§ 60-6,211.02 and 60-6,197); North Dakota (N.D.C.C. § 39-08-01(1)(e)); Rhode Island (R.I. Gen. Laws § 31-27-2.1); Tennessee (Tenn. Code § 55-10-406); Vermont (23 V.S.A. § 1201(b)); Virginia (Va. Code § 18.2-268.3).

pelled-consent laws have applied widely varying and sometimes inconsistent rationales, some relying on the search-incident-to-arrest exception and others on a theory of general reasonableness—a theory rejected by the court below—or on implied consent. As we also have shown, courts likewise are divided within these categories, with some rejecting implied consent or search-incident-to-arrest as a justification to search.

And this doctrinal confusion has practical consequences, creating uncertainty about state authority in this area. That is a matter of considerable significance, as States continue to consider the adoption of criminal penalties for refusing a breath test. At least four States have considered such legislation in recent years (California (AB 614 (2009)); Mississippi (HB 201 (2007)); Missouri (SB 780 (2010)); Montana (SB 308 (2011))); and "States and other governmental entities which enforce the driving laws" are considering the adoption of other "rules, procedures, and protocols that meet the reasonableness requirements of the Fourth Amendment" in response to this Court's decision in *McNeely*. 133 S. Ct. at 1569 (Kennedy, J., concurring in part).

In saying this, we of course recognize that "'[n]o one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it." *McNeeley*, 133 S. Ct. at 1565 (quoting *Michigan Dept. of State Police* v. *Sitz*, 496 U.S. 444, 451 (1990)). But States have made use of an extensive range of approaches in addressing drunk driving.

Among other options, 28 States treat test refusals a prior offense; 32 States have enacted alcohol laws that permit insurance companies to deny claims

associated with the consumption of alcohol; 37 States permit the use of sobriety checkpoints; 37 States impose administrative penalties for test refusal that exceed penalties for over-the-limit samples; 30 States hold establishments like bars and restaurants liable for serving alcohol to individuals who cause injuries as a result of intoxication; and all 50 States require some DWI offenders to equip their vehicles with ignition interlock devices.[12] These States also make use of implied-consent laws that impose "significant consequences" *other* than the imposition of criminal penalties when a motorist withdraws consent, including suspension of the driver's license and use of the test refusal in court. *McNeely*, 133 S. Ct. at 1566. Whatever ultimately is thought to be the constitutionality of these various approaches, the significance of the issue makes it imperative that this Court provide guidance in this context on the application of law enforcement tools that are both effective and consistent with the requirements of the Fourth Amendment.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[12] Robert B. Voras et al., *Implied-Consent Laws: A Review of the Literature and Examination of Current Problems and Related Statutes*, 40 J. Safety Res. 77 (2009); Nat'l Highway Traffic Safety Admin., Digest of Impaired Driving and Selected Beverage Control Laws (2013); *Dram Shop Civil Liability and Criminal Penalty Statutes*, Nat'l Conference of State Legislators (June 14, 2013), http://goo.gl/97Xd7s

Respectfully submitted.

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JUNE 2015

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[1] The representation of petitioner by a Clinic affiliated with Yale Law School does not reflect any institutional views of Yale Law School or Yale University.

APPENDICES

APPENDIX A

STATE OF MINNESOTA
IN SUPREME COURT
A13-1245

Court of Appeals
Gildea, C.J.
Dissenting, Page and Stras, JJ.

State of Minnesota,
Respondent,
vs.
William Robert Bernard, Jr.,
Appellant.

Filed: February 11, 2015
Office of Appellate Courts

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James C. Backstrom, Dakota County Attorney, Tori K. Stewart, Assistant County Attorney, Hastings, Minnesota, for respondent.

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SYLLABUS

1. Because a warrantless search of appellant's breath would have been constitutional as a search incident to a valid arrest, charging appellant with violating Minn. Stat. § 169A.20, subd. 2 (2014), for refusing to take a breathalyzer in this circumstance does not implicate a fundamental right.

2. Because Minn. Stat. § 169A.20, subd. 2, is a reasonable means to a permissive object, it does not violate appellant's right to due process under the United States or Minnesota Constitutions.

Affirmed.

OPINION

GILDEA, Chief Justice.

Minnesota law makes it a crime for a driver to refuse a request to take a chemical test to detect the presence of alcohol if certain conditions are met, including that the driver has been validly arrested for driving while impaired. Minn. Stat. § 169A.20, subd. 2 (2014). The question presented in this case is whether Minn. Stat. § 169A.20, subd. 2 ("test refusal statute"), violates appellant William Robert Bernard's right to due process under the United States

or Minnesota Constitutions by criminalizing his refusal to consent to an unconstitutional search. The district court held the test refusal statute was unconstitutional as applied to Bernard, but the court of appeals reversed. Because we conclude that the breath test the police asked Bernard to take would have been constitutional as a search incident to a valid arrest, and as a result, charging Bernard with criminal test refusal does not implicate a fundamental right, and that the test refusal statute is a reasonable means to a permissive object, we affirm.

This case arises from a report that police received on August 5, 2012, that three intoxicated men were attempting to get a boat out of the water at a boat launch in South Saint Paul. When police arrived at the boat launch, a witness told the officers that the men's truck became stuck in the river while they were trying to pull their boat out of the water. The witness also said that the driver of the truck was in his underwear. The officers approached the three men and saw that the truck's axle was hanging over the edge of the pavement. One of the men, appellant William Robert Bernard, was in his underwear. The officers could smell a strong odor of alcohol coming from the group. Bernard admitted to police that he had been drinking, but he and the other men denied driving the truck. Several additional witnesses identified Bernard as the driver and described him stumbling from the boat to the truck. As the officers questioned Bernard, they noted that his breath smelled of alcohol, he had bloodshot, watery eyes, and he was holding the keys to the truck. Bernard refused to perform field sobriety tests.

The officers arrested Bernard on suspicion of driving while impaired ("DWI") and took him to the

South Saint Paul police station. The officers read Bernard the Minnesota Implied Consent Advisory as required by Minn. Stat. § 169A.51, subd. 2 (2014). Specifically, police advised Bernard that Minnesota law required him to take a chemical test, that refusal to take a test was a crime, and that he had a right to consult with an attorney so long as there was not an unreasonable delay in the administration of the test. Police also gave Bernard an opportunity to contact an attorney. Bernard called his mother instead. After the call to his mother, Bernard told the officers he did not need any more time and refused to take a breath test.

The State charged Bernard with two counts of first-degree test refusal, Minn. Stat. §§ 169A.20, subd. 2, 169A.24 (2014).[1] Bernard filed a motion to dismiss, arguing that the test refusal statute violated due process because the statute makes it a crime to refuse an unreasonable, warrantless search of a driver's breath. The district court ruled that the test refusal statute was not unconstitutional on its face but dismissed the charges after concluding that the police lacked a lawful basis to search Bernard without a warrant. The court of appeals reversed, holding that prosecuting Bernard for refusal to take a breath test did not violate his due process rights because the facts of the case established that the officers had

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[1] A person is guilty of first-degree driving while impaired or criminal test refusal if that person "commits the violation within ten years of the first of three or more qualified prior impaired driving incidents." Minn. Stat. § 169A.24, subd. 1(1). A "qualified prior impaired driving incident" includes prior impaired driving convictions. Minn. Stat. § 169A.03, subd. 22 (2014). Bernard has four impaired driving convictions since 2006.

probable cause and could have secured a warrant to search Bernard's breath. We granted review.

I.

The test refusal statute, Minn. Stat. § 169A.20, subd. 2, makes it a crime to refuse a chemical test administered to detect the presence of alcohol in certain circumstances. *Id.* ("It is a crime for any person to refuse to submit to a chemical test of the person's blood, breath, or urine under section 169A.51 (chemical tests for intoxication) or 169A.52 (test refusal or failure; revocation of license)."). These circumstances include when an officer has probable cause to believe the person was driving, operating, or in physical control of a motor vehicle while under the influence of alcohol and the police have read the person the implied-consent advisory. *See* Minn. Stat. § 169A.51, subds. 1-2.

Bernard argues that Minnesota's test refusal statute, as applied to him, violates his right to substantive due process because it criminalizes his Fourth Amendment right to refuse an unconstitutional, warrantless search.[2] The Fourth Amendment

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[2] Bernard's brief states that "the district court should have found the statute unconstitutional on its face." But Bernard makes no argument in his brief explaining how the statute is unconstitutional in all applications. *United States v. Salerno*, 481 U.S. 739, 745 (1987) (stating that a facial challenge is "the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid"). Instead, Bernard's brief is devoted to arguing that Minnesota's test refusal law is unconstitutional as applied to him in this case. We therefore treat Bernard's appeal as an as-applied challenge. *See Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982) (stating that an issue "not argued in the briefs" is waived). In addition, counsel for Bernard seemed to make a broader argument at the hearing on

protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."[3] U.S. Const. amend. IV. The "ultimate measure" of a permissible government search under the Fourth Amendment is reasonableness. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652 (1995). Because Bernard bases his due process argument on a Fourth Amendment violation, we turn first to the question of whether a warrantless search of Bernard's breath would have been constitutional under the Fourth Amendment.

A.

The court of appeals held that the criminal charges against Bernard for refusing the breath test were constitutional under the Fourth Amendment because the officer had probable cause to believe that Bernard was driving under the influence and the officer could have sought and received a warrant based on that evidence. *State v. Bernard*, 844 N.W.2d 41, 47 (Minn. App. 2014). The court did not find an exception to the warrant requirement for the search of Bernard's breath. *Id.* at 45–46. Instead, it concluded that probable cause sufficient to support a warrant

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this matter, asserting that the statute is unconstitutional on its face because there is not a categorical exception to make all warrantless breath tests under the statute constitutional. We will not consider this argument because Bernard did not raise it in his brief. *State v. Morrow*, 834 N.W.2d 715, 724 n.4 (Minn. 2013) (stating that an issue argued at oral argument, but not raised in the briefs is waived).

[3] Bernard also references the Minnesota Constitution's prohibition against unreasonable searches and seizures. *See* Minn. Const. art. I, § 10. Bernard, however, is not asking us to extend broader search and seizure protection under the Minnesota Constitution than what the Fourth Amendment affords.

was enough to support the criminal test-refusal charge. *Id.*

The court of appeals' analysis is contrary to basic principles of Fourth Amendment law. A warrantless search is generally unreasonable, unless it falls into one of the recognized exceptions to the warrant requirement. *State v. Flowers*, 734 N.W.2d 239, 248 (Minn. 2007). On several occasions, the U.S. Supreme Court has explicitly rejected an exception to the warrant requirement based upon probable cause alone. *See, e.g., Katz v. United States*, 389 U.S. 347, 356–57 (1967); *Beck v. Ohio*, 379 U.S. 89, 96 (1964). We have also recognized that there is no probable cause exception to the warrant requirement. *See State v. Ortega*, 770 N.W.2d 145, 149 n.2 (Minn. 2009). Consistent with this precedent, we refuse to embrace the rule the court of appeals applied in this case.

Although the court of appeals' reasoning does not provide a basis for a constitutional search, the State advances several other theories for why a search of Bernard's breath would have been constitutional. One such argument is that police could have conducted a warrantless search of Bernard's breath as a search incident to a valid arrest. Bernard contends that because there is nothing he can do to destroy the evidence of alcohol concentration in his body, the search-incident-to-arrest exception does not apply to a search of his breath under *Arizona v. Gant*, 556 U.S. 332 (2009), and *Missouri v. McNeely*, ___ U.S. ___, 133 S. Ct. 1552 (2013).

A search incident to a lawful arrest is a well-recognized exception to the warrant requirement under the Fourth Amendment. *Gant*, 556 U.S. at 338; *see also Weeks v. United States*, 232 U.S. 383, 392

(1914) (explaining that the right "to search the person of the accused when legally arrested to discover and seize the fruits or evidences of crime" has been "uniformly maintained" in many cases "under English and American law"), *overruled on other grounds by Elkins v. United States*, 364 U.S. 206 (1960). Under this exception, the police are authorized to conduct a "full search of the person" who has been lawfully arrested. *United States v. Robinson*, 414 U.S. 218, 235 (1973). Our court has allowed searches of the body beyond a pat down of those police have lawfully arrested. For example, we have held that the warrantless inspection of an arrested man's penis was a valid search incident to arrest, noting that someone "lawfully subjected to a custodial arrest retains no significant Fourth Amendment interest in the privacy of his person." *State v. Riley*, 303 Minn. 251, 254, 226 N.W.2d 907, 909 (1975). We have also upheld the taking of fingerprints and photographs of someone who has been arrested. *State v. Bonner*, 275 Minn. 280, 287, 146 N.W.2d 770, 775 (1966); *see also State v. Emerson*, 266 Minn. 217, 221, 123 N.W.2d 382, 385 (1963) (noting that subjecting an arrested man to photographs, X-rays, and a medical examination did not violate his due process rights).

Taking a sample of an arrestee's breath is not materially different from the warrantless searches upheld in these cases.[4] Based on this authority, we

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[4] The dissent argues that our holding "fundamentally departs from longstanding Fourth Amendment principles." A search of an arrestee's breath, however, is not a departure from search-incident-to-arrest exception case law. Courts have upheld a variety of searches that included the removal of biological material and searches within the arrestee's body as valid searches incident to arrest. *See United States v. D'Amico*, 408 F.2d 331, 332-33 (2d Cir. 1969) (upholding the warrantless sei-

conclude that a warrantless breath test of Bernard would not have violated the Fourth Amendment because it is a search incident to Bernard's valid arrest.

Our conclusion that a warrantless breath test does not violate the Fourth Amendment because it falls under the search-incident-to-a-valid-arrest exception is consistent with decisions from other courts. *See, e.g.*, *United States v. Reid*, 929 F.2d 990, 994 (4th Cir. 1991) (holding that breathalyzer tests were reasonable searches under the Fourth Amendment because they were searches incident to lawful arrests); *Burnett v. Municipality of Anchorage*, 806 F.2d 1447, 1450 (9th Cir. 1986) ("It is clear then that the breathalyzer examination in question is an appropriate and reasonable search incident to arrest which appellants have no constitutional right to refuse."); *Byrd v. Clark*, 783 F.2d 1002, 1005 (11th Cir. 1986) (holding that "officers would have been justified in conducting a [breath] search" under the search-incident-to-arrest exception); *Wing v. State*, 268 P.3d 1105, 1110 (Alaska Ct. App. 2012) (holding that a breath test was a valid search incident to arrest); *State v. Dowdy*, 332 S.W.3d 868, 870 (Mo. Ct. App. 2011) (same); *State v. Hill*, No. 2008-CA-0011, 2009 WL 1485026, at *5 (Ohio Ct. App. May 22,

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zure of a few strands of the arrestee's hair); *Espinoza v. United States*, 278 F.2d 802, 804 (5th Cir. 1960) (upholding a forcible search of an arrestee's mouth for narcotics). Courts have also upheld chemical testing conducted on parts of a defendant's body as a search incident to arrest. *See United States v. Johnson*, 445 F.3d 793, 795–96 (5th Cir. 2006) (upholding gunpowder residue testing done on defendant's hands as a search incident to arrest); *Jones v. State*, 74 A.3d 802, 812-13 (Md. Ct. Spec. App. 2013) (same and citing other cases so holding); *State v. Riley*, 500 S.E.2d 524, 533 (W. Va. 1997) (same); *Sen v. State*, 301 P.3d 106, 117–18 (Wyo. 2013) (same).

2009) (same); *Commonwealth, Dep't of Transp. v. McFarren*, 525 A.2d 1185, 1188 (Pa. 1987) (same).[5] Indeed, our research has not revealed a single case anywhere in the country that holds that a warrantless breath test is not permissible under the search-incident-to-a-valid-arrest exception.[6]

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[5] The dissent claims that our conclusion is unprecedented because our holding authorizes the collection of biological material from inside the defendant's body as a lawful search incident to arrest. The dissent is mistaken. As the cases we cited above indicate, courts for nearly 30 years have found a breath test is a lawful search incident to arrest. The dissent does not, and indeed cannot, cite any Supreme Court case holding that a search incident to arrest does not apply to biological material.

[6] The dissent is unable to find any contrary authority. Other courts, including the Texas Court of Criminal Appeals in the case cited by the dissent, have held that a blood test cannot be justified by the search-incident-to-arrest exception. *See, e.g.*, *State v. Baker*, 502 A.2d 489, 492–93 (Me. 1985) (rejecting the search-incident-to-arrest exception as justifying a warrantless blood draw, but upholding the test under the exigent circumstances exception); *State v. Stern*, 846 A.2d 64, 68 (N.H. 2004) (suggesting that exigent circumstances is the only exception that can justify a warrantless blood draw); *State v. Welch*, 342 S.E.2d 789, 794 (N.C. 1986) (same); *State v. Villarreal*, ___ S.W.3d ___, 2014 WL 6734178, at *18 (Tex. Crim. App. Nov. 26, 2014) (holding that the search-incident-to-arrest exception cannot justify a warrantless blood draw). Although not in the context of driving while impaired, we have also determined that a warrantless blood sample search was unconstitutional. *State v. Campbell*, 281 Minn. 1, 10, 161 N.W.2d 47, 54 (1968) ("[A]bsent unusual circumstances, an intrusion upon the body of a citizen should properly be made only by authority of a warrant issued by a magistrate, for it is a search and seizure within the limitations of the Fourth Amendment."). In this case, however, the officers did not ask Bernard to submit to a blood test. Therefore, the question of a blood or urine test incident to arrest is not before us, and we express no opinion as to whether a blood or urine test of a suspected drunk driver could be justified as a

B.

Bernard and the dissent argue, however, that the Supreme Court has been retracting the scope of searches that are constitutional under the search-incident-to-arrest exception. To support this argument, Bernard relies on *Arizona v. Gant*, 556 U.S. 332. *Gant*, however, did not address a search of a person; *Gant* involved the search of the *area* from which the defendant was arrested, specifically, the defendant's automobile. 556 U.S. at 336. As Bernard notes, the Court discussed that the search-incident-to-a-valid-arrest exception derives from concerns over officer safety and a desire to preserve evidence. *Id.* at 338. Because the police had secured the defendant in the back of a squad car, these concerns were nonexistent in *Gant* and the Court held that the warrantless search of the defendant's automobile did not fall under the search-incident-to-arrest exception. *Id.* at 351.

Similar to *Gant*, Bernard argues that the State in this case cannot show that a search of his breath was related to officer safety or concerns that he would destroy evidence. That may be true,[7] but it does not compel the conclusion that the search-incident-to-arrest exception does not apply here. This is so because there are two distinct types of searches that fall within the exception. *Robinson*, 414 U.S. at

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search incident to arrest. The differences between a blood test and a breath test are material, and not the least of those differences is the less-invasive nature of breath testing. *See Skinner v. Ry. Labor Execs. Ass'n*, 489 U.S. 602, 626 (1989) (stating that, unlike blood tests, breath tests do not "implicate[] significant privacy concerns").

[7] The State makes no argument in this case that the breath test was necessary to protect the safety of the officers or jailers from an intoxicated arrestee.

224. First, police may conduct a search "of the *person* of an arrestee by virtue of the lawful arrest." *Id.* Second, a search may be made of the area within the immediate control of the arrestee. *Id.* It is the first type of search—the search of the arrestee's person—that is relevant here.

There is no question that the Court has required either a concern for officer safety or a concern over the preservation of evidence to support the constitutionality of a warrantless search of the area where the defendant was arrested or a search of items near the defendant. But the Court has not applied these concerns as a limitation on the warrantless search of the body of a person validly arrested. A brief review of the Court's cases illustrates this distinction.

In *Chimel v. California*, the U.S. Supreme Court held that following an arrest, a police officer may search the person of the arrestee *and* the area within his or her immediate control to remove weapons and to seize evidence. 395 U.S. 752, 762–63 (1969). The Court explained that the search promoted officer safety and prevented the destruction or concealment of evidence. *Id.* at 763. A search of the arrestee's entire home, however, was not justified as a search incident to arrest. *Id.*

A few years later, in *United States v. Robinson*, the Court clarified the justification for the search of *a person* under the search-incident-to-arrest exception. In *Robinson*, a police officer arrested the defendant for driving with a revoked license and subsequently performed a patdown search. 414 U.S. at 220-23. The officer pulled an unidentified object from the defendant's pocket and discovered that it was a cigarette package. *Id.* at 223. Upon opening the package, the officer found 14 capsules of heroin. *Id.* The Court

held that the police lawfully discovered the heroin as part of a search incident to arrest. *Id.* at 236.

Through its holding, the U.S. Supreme Court overruled the analysis from the United States Court of Appeals for the District of Columbia Circuit. *Id.* at 237. The court of appeals concluded that the search-incident-to-arrest exception did not apply. *United States v. Robinson*, 471 F.2d 1082, 1108 (D.C. Cir. 1972). The exception did not apply because the police did not have reasonable grounds to believe that the defendant, who police arrested for driving after license revocation, would have any additional evidence of the crime on his person, and because there was no evidence that police were concerned for their safety when they searched the defendant. *Id.* at 1094, 1098 (D.C. Cir. 1972). The Supreme Court termed these limitations, within the context of a search of the person of a validly arrested defendant, as "novel" and rejected them. *Robinson*, 441 U.S. at 229. Rather than constricted by the limitations the appellate court had adopted, the Supreme Court referred to the police's "authority" to search an arrested person as "unqualified." *Id.* The Court held that "in the case of a lawful custodial arrest *a full search of the person* is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment." *Id.* at 235 (emphasis added). In other words, in *Robinson*, the Court characterized a warrantless search of a person as categorically reasonable under the Fourth Amendment as a search incident to that person's valid arrest. *See McNeely*, ___ U.S. at ___, 133 S. Ct. at 1559 n.3 (citing *Robinson*).

Subsequent cases have addressed and limited the second type of search under the search-incident-to-

arrest exception, a search of the area or things within the immediate control of the arrestee, but they have not narrowed the exception with respect to a search of the arrestee's body. *See Gant*, 556 U.S. at 351 (holding that the "[p]olice may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search"); *United States v. Chadwick*, 433 U.S. 1, 14-15 (1977) (holding that a locked footlocker seized at the time of a defendant's arrest could not be justified as a search of the area within the arrestee's immediate control "if the 'search is remote in time or place from the arrest' " or if the police have exclusive control of the property and "there is no longer any danger that the arrestee might gain access to the property" (quoting *Preston v. United States*, 376 U.S. 364, 367 (1964)), *abrogated on other grounds by California v. Acevedo*, 500 U.S. 565 (1991).

Just last term, in *Riley v. California*, the Court addressed whether police could search a "particular category of effects"—digital data found within a cell phone seized during an arrest—without a warrant under the search-incident-to-arrest exception. ___ U.S. ___, 134 S. Ct. 2473, 2485 (2014). In concluding that the police could not search data on the cell phone as a search incident to arrest, the Court reaffirmed "*Robinson*'s admonition that searches of a person incident to arrest . . . are reasonable regardless of 'the probability in a particular arrest situation that weapons or evidence would in fact be found.' " *Id.* at ___, 134 S. Ct. at 2485 (quoting *Robinson*, 414 U.S. at 235). In a custodial arrest situation, those concerns are always present and do not need to be specifically identified or proven to justify a search. *Id.* at ___, 134 S. Ct. at 2484-85. Therefore, far from

overruling or narrowing *Robinson*, the Court recognized again *Robinson*'s "categorical rule," which allows a search of the person of an arrestee justified only by the custodial arrest itself, and simply chose not to extend that categorical exception to digital data found within a cellphone. *Id.* at ___, 134 S. Ct. at 2484.

The dissent reads *Riley* much differently than we do. It claims the Supreme Court in *Riley* "confirmed that when it refers to a search of a person incident to arrest, as in *Robinson*, it is talking about personal property—that is, evidence—found *on* a person." As support, the dissent cites to *Riley's* discussion of *Robinson*, 414 U.S. at 235, and *Chadwick*, 433 U.S. at 15. The dissent misreads *Riley*.[8]

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[8] The dissent's interpretation of *Riley* makes no logical sense. Even though the Court in *Riley* reaffirmed *Robinson*'s holding that "searches of a person" are lawful as part of a search incident to arrest without any additional showing by the government, *see Riley*, __ U.S. at __, 134 S. Ct. at 2485, the dissent asserts that the phrase "searches of a person" actually refers to personal property found on a person. We think that if the Supreme Court intended the phrase "searches of a person" to exclude searching the actual person, i.e., their body, and to only include searching personal property found on a person, the Court would have clearly said so. We are also hard pressed to understand how the police can even search personal property found on a person without first searching the actual person.

The dissent also claims that because the Supreme Court in *Riley* did not extend its holding from *Robinson* regarding the type of objects found on a person that may be categorically searched incident to arrest to digital content found within a cell phone, "the only logical conclusion is that the removal of breath (or blood or urine) from the body to discover an arrestee's blood alcohol level is not part of a search incident to arrest." We disagree. The search at issue in *Riley* was not a search of the defendant's body, like the search involved in this case, but a

In discussing these two cases in *Riley*, the Court explained that in *Robinson*, "the Court did not draw a line between a search of Robinson's person and a further examination of the cigarette pack found during that search." *Riley*, ___ U.S. at ___, 134 S. Ct. at 2484. The Court went on to explain that in *Chadwick*, it did make a distinction between a search of the person and the personal property, a footlocker that was in the exclusive control of law enforcement officers, found during that search. *Id.* at ___, 134 S. Ct. at 2484. It "clarified that this exception [requiring no additional justification for the search] was

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search of a physical object found on the defendant. In addition, the search that occurs when a breath test is taken is clearly distinguishable from the search of the contents of a person's cell phone. In *Riley*, the Court emphasized that even with the diminished expectation of privacy that comes with a custodial arrest, a search of a cell phone would be intrusive. *Riley*, ___ U.S. at ___, 134 S. Ct. at 2485. The Court noted that "[m]odern cell phones, as a category, implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse" because they contain vast quantities of highly personal information about a person. *Id.* at ___, 134 S. Ct. at 2488-89. The same cannot be said for a breathalyzer test, which reveals nothing more than the level of alcohol in the arrestee's bloodstream. *See Skinner*, 489 U.S. at 625.

Finally, our conclusion that *Riley* did not limit the full body search of an arrestee authorized by *Robinson* is reinforced by other language in the opinion. The Court reiterated later in *Riley* that "we do not overlook *Robinson*'s admonition that searches of a person incident to arrest, 'while based upon the need to disarm and to discover evidence' are reasonable regardless of 'the probability in a particular arrest situation that weapons or evidence would in fact be found.'" *Riley*, ___ U.S. at ___, 134 S. Ct. at 2485 (quoting *Robinson*, 414 U.S. at 235). There would have been no need for the court to reaffirm its holding from *Robinson* regarding "searches of a person incident to arrest" if *Robinson* only authorized the search of personal property found on an arrestee. *Id.* at ___, 134 S. Ct. at 2485.

limited to 'personal property . . . immediately associated with the person of the arrestee.' " *Id.* at ___, 134 S. Ct. at 2484 (quoting *Chadwick*, 433 U.S. at 15). The dissent relies on this last sentence to support its interpretation of *Riley*.

When this quote is put in context, it is clear that the Court was not limiting the categorical search of an arrestee's body that may be performed as a search incident to arrest. Instead, the Court was explaining that *Chadwick* had limited the *type of property* that may be categorically searched as part of a search incident to arrest to property immediately associated with the arrestee. Moreover, because the searches being challenged in both *Riley* and *Chadwick* were not searches of the arrestee's body itself, it is hard to see how those cases can be read to have placed restrictions on such a search.

In short, we reject as unpersuasive both Bernard's and the dissent's arguments that *Gant* and *Riley* require us to conclude that the search-incident-to-arrest exception does not apply to the warrantless search of his breath.

Bernard also argues that the search-incident-to-arrest exception cannot apply to a breath test under *Missouri v. McNeely*, ___ U.S. ___, 133 S. Ct. 1552 (2013). The U.S. Supreme Court in *McNeely*, however, addressed only the exigent-circumstances exception to the warrant requirement. *Id.* at ___, 133 S. Ct. at 1556 (addressing whether the "natural metabolization of alcohol in the bloodstream presents a *per se* exigency that justifies an exception to the Fourth Amendment's warrant requirement for non-consensual blood testing in all drunk-driving cases"). The government did not raise the search-incident-to-arrest exception in its argument to the Supreme

Court.[9] *See* Brief for Petitioner, *Missouri v. McNeely*, ___ U.S. ___, 133 S. Ct. 1552 (2013) (No. 11-1425). In fact, *McNeely* only mentioned the search-incident-to-arrest exception by contrasting it with the exigent-circumstances exception to the warrant requirement, noting that unlike the exigent-circumstances exception, the search-incident-to-arrest exception is categorical and does not require a case-by-case assessment of the circumstances.[10] *McNeely*, ___ U.S. at ___, 133 S. Ct. at 1559 n.3. Therefore, the Supreme Court's decision in *McNeely* does not foreclose our decision regarding the search-incident-to-arrest exception to the warrant requirement.

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[9] A group of state attorneys general did argue that the search in *McNeely* was permissible under the search-incident-to-arrest exception. Brief for Delaware, et al. as Amici Curiae Supporting Petitioner at 7-20, *Missouri v. McNeely*, ___ U.S. ___, 133 S. Ct. 1552 (2013) (No. 11-1425). The U.S. Supreme Court, however, does not consider arguments "not raised by the parties or passed on by the lower courts." *F.T.C. v. Phoebe Putney Health Sys., Inc.*, ___ U.S. ___, 133 S. Ct. 1003, 1010 n.4 (2013).

[10] Specifically, the Supreme Court recognized that "searches of a person incident to a lawful arrest" are part of a "limited class of traditional exceptions to the warrant requirement that apply categorically and thus do not require an assessment of whether the policy justifications underlying the exception . . . are implicated in a particular case." *McNeely*, ___ U.S. at ___, 133 S. Ct. at 1559 n.3. The dissent is therefore mistaken that it "strains credulity to suppose" that the search-incident-to-arrest exception would apply to a future warrantless breath test case because the exception "turns on the same rationale regarding the preservation of evidence that the Supreme Court explicitly rejected in *McNeely*." The Supreme Court reaffirmed in *McNeely* that a search of a person incident to arrest is categorically justified not by a specific rationale for the preservation of evidence, but by a lawful arrest.

Based on our analysis above, the warrantless search of Bernard's breath would have been reasonable as a search incident to his valid arrest. The undisputed facts of this case establish that the police had probable cause to arrest Bernard for DWI. Indeed, Bernard does not dispute that the police validly arrested him before asking him to submit to a breathalyzer test. The breath test was a search of Bernard's person that would have been no more intrusive than the myriad of other searches of the body that we and other courts have upheld as searches incident to a valid arrest. *See, e.g.*, *Riley*, 303 Minn. at 254, 226 N.W.2d at 909. We therefore conclude that a breath test is a search of the arrestee's person and is justified by virtue of the lawful arrest itself. As a result, we hold that a warrantless breath test of Bernard would have been constitutional under the search-incident-to-arrest exception to the Fourth Amendment's warrant requirement.[11]

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[11] The dissent argues that our holding ignores the U.S. Supreme Court's narrowing of the search-incident-to-arrest exception. The Supreme Court, however, has not been narrowing the search-incident-to-arrest exception as it applies to searches of the arrestee's person. Instead, the Court has been clarifying the exception's application to a search of the area or things within the arrestee's immediate control. *See Riley*, ___ U.S. at ___, 134 S. Ct. at 2484-85 (holding that searching the data on a cell phone was not a search incident to arrest, but recognizing a categorical exception justifying searches of an arrestee's person); *Gant*, 556 U.S. at 339 (discussing searches incident to arrest in the context of a search of an automobile).

Further, despite narrowing the scope of the exception in terms of searches other than of the defendant's body, the U.S. Supreme Court has not overruled *Robinson*, and "only the Supreme Court may overrule one of its own decisions." *State v. Brist*, 812 N.W.2d 51, 56 (Minn. 2012) (citing *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 535 (1983)).

II.

We turn next to Bernard's substantive due process challenge to the test refusal statute. The due process clauses of the United States and Minnesota Constitutions "prohibit 'certain arbitrary, wrongful government actions, regardless of the fairness of the procedures used to implement them.' " *Boutin v. LaFleur*, 591 N.W.2d 711, 716 (Minn. 1999) (quoting *Zinermon v. Burch*, 494 U.S. 113, 125 (1990)); *see also* U.S. Const. amends. V, XIV; Minn. Const. art. I, § 7. When assessing a due process challenge, the analysis we apply depends on whether the statute implicates a fundamental right. *Boutin*, 591 N.W.2d at 716. Having decided that the search of Bernard's breath would have been constitutional, we find no fundamental right at issue here, as Bernard does not have a fundamental right to refuse a constitutional search. *See Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (stating that fundamental rights for purposes of substantive due process are those rights and liberties "which are, objectively, deeply rooted in this Nation's history and tradition" and are "implicit in the concept of ordered liberty" (citations omitted) (internal quotation marks omitted)).

If a statute does not implicate a fundamental right, we assess its constitutionality using rational

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The Supreme Court has stated, "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, [courts] should follow the case which directly controls . . . ." *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989). *Robinson*'s discussion of searches of the person incident to arrest is on point in this case. The Supreme Court has not overruled *Robinson*, and so we will follow it. Under *Robinson*, a search of Bernard's breath incident to his arrest is a permissible search by virtue of his lawful arrest.

basis review. *See State v. Behl*, 564 N.W.2d 560, 567 (Minn. 1997). To survive a due process challenge using rational basis review, the statute must not be "arbitrary or capricious." *Id.* We will uphold the statute as long as it is "a reasonable means to a permissive object." *Id.* We review the constitutionality of statutes de novo. *State v. Henning*, 666 N.W.2d 379, 382 (Minn. 2003).

The object of the Minnesota Impaired Driving Code, Minn. Stat. § 169A.01 *et seq.*, is public safety. We have recognized the "severe threat" that impaired drivers pose to the public's safety. *Heddan v. Dirkswager*, 336 N.W.2d 54, 62–63 (Minn. 1983). Indeed, 30 percent of traffic deaths in Minnesota in 2013 were alcohol-related. Minn. Dep't of Pub. Safety, *Minnesota Motor Vehicle Crash Facts 2013* 39 (2014). And we have said that "the state has a compelling interest in highway safety justifying efforts to keep impaired drivers off the road." *Bendorf v. Comm'r of Pub. Safety*, 727 N.W.2d 410, 417 (Minn. 2007) (citing *Heddan*, 336 N.W.2d at 63). Securing effective chemical tests to determine whether drivers suspected of being under the influence are in fact driving while impaired is reasonably related to the government's interest in keeping impaired drivers off the road.

Encouraging drivers to submit to such tests, through criminalizing their refusal, furthers that interest. In fact, one study concludes that alcohol concentration test refusals compromise the enforcement of drunk-driving laws. Ralph K. Jones & James L. Nichols, *Breath Test Refusals and Their Effect on DWI Prosecution* 42 (2012) (concluding that "[a]s statewide refusal rates increased, overall conviction rates . . . decreased"). And another study finds that

Minnesota's test refusal statute has led to a lower refusal rate and an increased conviction rate for alcohol-related offenses, including driving under the influence and test refusal. H.L. Ross, et al., *Causes and Consequences of Implied Consent Test Refusal*, 11 Alcohol, Drugs and Driving 57, 71–72 (1995).

In sum, it is rational to conclude that criminalizing the refusal to submit to a breath test relates to the State's ability to prosecute drunk drivers and keep Minnesota roads safe. We therefore hold that the test refusal statute is a reasonable means to a permissive object and that it passes rational basis review.

Affirmed.

DISSENT

PAGE, Justice, and STRAS, Justice (dissenting jointly).

We respectfully dissent. The court apparently wishes that we lived in a world without *Missouri v. McNeely*, ___ U.S. ___, 133 S. Ct. 1552 (2013), and one in which there are no limits to the search-incident-to-arrest doctrine. But we do not live in such a world. The Supreme Court of the United States has decided *McNeely* and, over the past several decades, has limited searches incident to arrest. Even though the court's opinion strikes a confident tone, the truth of the matter is that its decision is borne of obstinance, not law. The court today fundamentally departs from longstanding Fourth Amendment principles, and nullifies the warrant requirement in nearly every drunk-driving case.

I.

As justices of a state supreme court, we are bound to follow decisions of the Supreme Court of the

United States on questions of federal law. U.S. Const. Art. VI. Rather than carrying out its duty, the court selectively quotes from some Supreme Court decisions and ignores others to reach a decision that is at odds with Supreme Court precedent on the scope of searches incident to arrest. Two erroneous assumptions permeate the court's analysis. First, the court assumes, without support, that biological material may be taken from *inside* a person's body as part of a search incident to arrest. Second, the court assumes, again without support, that the rationales underlying the search-incident-to-arrest exception—officer safety and preventing the destruction of evidence, *see Chimel v. California*, 395 U.S. 752, 762-63 (1969)—do not apply to searches of a person. In the end, the court ultimately arrives at a decision that is as notable for its disregard of Supreme Court precedent as it is for its defective logic.

A.

To start with the court's first assumption, the Supreme Court has never implied, much less stated, that the search-incident-to-arrest exception extends to the forcible removal of substances from within a person's body.

The court relies almost exclusively on *United States v. Robinson*, 414 U.S. 218 (1973), a search-incident-to-arrest case that is not as expansive as the court claims. In approving the warrantless breath test that Bernard refused in this case, the court seizes upon *Robinson's* statement that, "in the case of a lawful custodial arrest[,] a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment." *Id.* at 235. The court then insists, contrary to authority, that the Supreme

Court has not subsequently "narrowed the [search-incident-to-arrest] exception with respect to a search of the arrestee's body." The court starts from the premise that the Supreme Court intended a "full search of the person" to be so broadly defined as to include the compelled removal of biological material from inside the body, and then effectively ignores everything the Supreme Court has said since *Robinson* about searches incident to arrest.

Although *Robinson*'s language is broad, it is not unlimited, and it does not support the invasive search at issue in this case. In *Robinson*, the police arrested the defendant for driving after his license had been revoked. 414 U.S. at 220-21. In accordance with standard procedures, an officer searched Robinson and found a cigarette package that contained heroin in Robinson's coat pocket. *Id.* at 221-23. At Robinson's trial, the trial court admitted the heroin into evidence, and Robinson was convicted, largely because of the heroin found during the search incident to his arrest. *Id.* at 223. The Supreme Court held that a search of a person incident to arrest is not limited to a protective frisk for weapons, as in *Terry v. Ohio*, 392 U.S. 1 (1968), and may extend to the preservation of evidence of the particular crime for which the arrest was made. *Id.* at 234-35. Ultimately, the Supreme Court concluded that it was the "lawful arrest" itself that provided the authority to search, and that the search conducted in *Robinson* was reasonable under the Fourth Amendment. *Id.* at 235.

In the context of this case, *Robinson* is more notable for its facts than for what it said. Despite the Supreme Court's broad language, the search in *Robinson* was unremarkable. The "full search of the per-

son" involved only a pat down and an examination of the contents of Robinson's pockets, not an invasive search to retrieve biological material from within his body. *See id.* at 222-23; *see also Illinois v. Lafayette*, 462 U.S. 640, 645 (1983) (stating that "the interests supporting a search incident to arrest would hardly justify disrobing an arrestee on the street").

Any doubt about the bounds of *Robinson* vanished after *Riley v. California*, ___ U.S. ___, 134 S. Ct. 2473 (2014), when the Supreme Court confirmed that, when it refers to a search of a person incident to arrest, as in *Robinson*, it is talking about personal property—that is, evidence—found *on* a person. In *Riley*, a case involving the digital content of cell phones, the Supreme Court reviewed the history of the search-incident-to-arrest exception. *Id.* at ___, 134 S. Ct. at 2482-84. After discussing several cases, the Supreme Court turned its attention to *Robinson*. *Id.* at ___, 134 S. Ct. at 2483-84. It explained that, four years after *Robinson*, it "[had] clarified that [the search-incident-to-arrest] exception was limited to '*personal property* . . . immediately associated with the person of the arrestee.' " *Id.* at ___, 134 S. Ct. at 2484 (quoting *United States v. Chadwick*, 433 U.S. 1, 15 (1977) (emphasis added)); *see also Robinson*, 414 U.S. at 226 (an arresting officer may "search for and seize any evidence *on* the arrestee's person" (quoting *Chimel v. California*, 395 U.S. 752, 762-63 (1969)) (emphasis added)). The Supreme Court repeated its cautionary note about the proper scope of a search incident to arrest just four paragraphs later when it said that, "while *Robinson*'s categorical rule strikes the appropriate balance in the context of *physical objects*, neither of its rationales has much force with respect to digital content on cell phones." *Riley*, ___ U.S. at ___, 134 S. Ct. at 2484 (emphasis added); *see*

also id. at ___, 134 S. Ct. at 2489 ("A conclusion that inspecting the contents of an arrestee's pockets works no substantial additional intrusion on privacy beyond the arrest itself may make sense as applied to physical items, but any extension of that reasoning to digital data has to rest on its own bottom."). Given *Riley's* clarification that *Robinson* applies only to physical evidence found on a person's body—and not digital content found on cell phones—the only logical conclusion is that the removal of breath (or blood or urine) from the body to discover an arrestee's blood alcohol level is not part of a search incident to arrest.[12]

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[12] One could point to the Supreme Court's recent decision in *Maryland v. King*, ___ U.S. ___, 133 S. Ct. 1958 (2013), as support for the warrantless breath test at issue in this case. After all, in *King*, the Supreme Court upheld a warrantless search by which jail officials used a buccal swab to collect DNA from an arrestee under a Maryland statute. *Id.* at ___, 133 S. Ct. at 1980. The statute, the Maryland DNA Collection Act, required officers to collect a DNA sample from arrestees charged with serious crimes, but critically, the Maryland law did not subject the collection requirement to the discretion of officers. *Id.* at ___, 133 S. Ct. at 1970. The Supreme Court sanctioned the warrantless search in *King* as a routine booking procedure, not as a search incident to arrest. *Id.* at ___, 133 S. Ct. at 1971, 1977. *King* therefore does not permit a warrantless search, as here, when officers have discretion to conduct the search based on individualized suspicion and concerns about evidence preservation, rather than on an administrative interest in identifying the arrestee.

Likewise, *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989), although at least involving a breath test, is a case that arose under a different branch of Fourth Amendment doctrine. In *Skinner*, the Supreme Court upheld a warrantless breath test for railroad employees who worked in a "regulated industry" and had effectively "consent[ed] to significant restrictions in [their] freedom of movement where necessary for

The court nevertheless reads *Robinson* as authority for conducting any search of an arrestee, even one that collects material from within a person's body. In doing so, the court fails to address two flaws in its approach. First, molecules of ethanol (C2H6O) in a person's blood are not "physical objects" in the same sense as a "crumpled up cigarette package," *see Robinson*, 414. U.S. at 223, coins, *see Chimel*, 395 U.S. at 754, or a bag of cocaine, *see Arizona v. Gant*, 556 U.S. 332, 336 (2009). It seems obvious that, similar to the digital content of a cell phone, alveolar "deep-lung" air "differ[s] in both a quantitative and a qualitative sense from other objects that might be kept on an arrestee's person." *See Riley*, ___ U.S. at ___, 134 S. Ct. at 2489.[13]

[their] employment." *See id.* at 624-25, 628. The triggering event for the breath test conducted in *Skinner* was a "major train accident," not an arrest, and its purpose was safety, not prosecution. *Id.* at 609, 621, 622 n.6. *Skinner* was, in other words, a "special needs" case, and like *King*, the Supreme Court recognized that it was departing from "the usual warrant and probable-cause requirements" applicable to law enforcement. *Id.* at 620 (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 873-74 (1987)). In this case, the State has not identified a "special need" for the warrantless breath test it sought to administer to Bernard.

[13] Even if breath can somehow be considered a "physical object" that is "personal property," any breath test that could have been performed in this case would still not qualify as a search incident to arrest because it would have been "remote in time or place from the arrest." *United States v. Chadwick*, 433 U.S. 1, 15 (1977) (quoting *Preston v. United States*, 376 U.S. 364, 367 (1964)), *abrogated on other grounds by California v. Acevedo*, 500 U.S. 565 (1991). In fact, that is precisely what the Texas Court of Criminal Appeals, the court of last resort for criminal matters in Texas, recently recognized in the context of a blood draw. *See State v. Villarreal*, ___ S.W.3d ___, 2014 WL 6734178,

Second, the court fails to acknowledge that a search incident to arrest is limited to evidence found *on* an arrestee's body. Typically, a person taking a breath test must insert a tube into his or her mouth and then comply with the officer's instructions to blow into the tube at a specified rate until the breathalyzer has had sufficient time to analyze a sample of deep-lung air. *See, e.g.*, *California v. Trombetta*, 467 U.S. 479, 481 (1984) (describing requirements for administering the Intoxilyzer). Failure to produce an "adequate . . . sample" is punishable by up to 7 years in prison. *See* Minn. Stat. §§ 169A.20, subds. 2-3, 169A.51-52 (2014). The court does not cite a single Supreme Court case authorizing such a profound intrusion *into* a person's bodily integrity during a search incident to arrest. *Cf. Skinner*, 489 U.S. 616-17 (recognizing that testing deep-lung breath, like conducting a blood test, raises "similar concerns about bodily integrity"); *King*, ___ U.S. at ___, 133 S. Ct. at 1989 (Scalia, J., dissenting) ("I doubt that the proud men who wrote the charter of our liberties would have been so eager to open their mouths for royal inspection."). The reason is that no such case exists.

A warrantless search is unreasonable unless it falls within a specific exception to the warrant requirement. *Riley*, ___ U.S. at ___, 134 S. Ct. at 2482. Instead of acknowledging that its decision repudiates longstanding Fourth Amendment principles, the court responds by saying that the Supreme Court has never explicitly forbidden the particular type of warrantless search at issue in *this* case. Such reasoning, however, turns the warrant requirement on its

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at *15 (Tex. Crim. App. Nov. 26, 2014) (quoting *Chadwick*, 433 U.S. at 15).

head, allowing it to serve as a presumption in favor of warrantless searches rather than as a safeguard against them.

B.

The court's second assumption is equally extreme: that the rationales for the search-incident-to-arrest exception—officer safety and preventing the destruction of evidence—do not apply to searches of a person. Again, the court's assumption is in conflict with Supreme Court precedent.

In *Chimel v. California*, 395 U.S. 752 (1969), the Supreme Court considered whether an arrest of a person in his home permitted the police to search the entirety of the arrestee's three-bedroom home, including his attic and garage. The Supreme Court invalidated the search and identified the two rationales that support searches incident to arrest: protecting the safety of officers and preventing the concealment and destruction of evidence. *Id.* at 762-63. Those rationales allow an arresting officer, without a warrant, to (1) "search the person arrested in order to remove any weapons," (2) "search for and seize any evidence *on the arrestee's person* in order to prevent its concealment or destruction," and (3) search in "the area into which an arrestee might reach." *Id.* (emphasis added); *see also Riley*, ___ U.S. at ___, 134 S. Ct. at 2483 (quoting *Chimel*, 395 U.S. at 762-63). The court now contends, however, that neither rationale applies to a search for evidence on an arrestee's person, but only to searches of the area under the arrestee's immediate control.

As support, the court seizes on *Riley*'s acknowledgement of "*Robinson*'s admonition that searches of a person incident to arrest, 'while based upon the need to disarm and to discover evidence,' are reason-

able regardless of 'the probability in a particular arrest situation that weapons or evidence would in fact be found.' " ___ U.S. at ___, 134 S. Ct. at 2485 (quoting *Robinson*, 414 U.S. at 235). The court references this statement as proof that, "far from overruling or narrowing *Robinson*, the [Supreme] Court [in *Riley*] recognized again *Robinson*'s 'categorical rule' allowing a search of the person of an arrestee justified only by the custodial arrest itself . . . ."

The court misinterprets *Robinson*, and entirely ignores the remainder of *Riley*, including its holding, which "decline[d] to extend *Robinson* to searches of data on cell phones" based on the rationales from *Chimel*. ___ U.S. at ___, 134 S. Ct. at 2485. As the Supreme Court explained, *Robinson* rejected the need for "case-by-case adjudication" to determine whether the *Chimel* rationales were present in a "particular arrest situation." *Id.* at ___, ___, 134 S Ct. at 2483, 2485; *see also United States v. Chadwick*, 433 U.S. 1, 14-15 (1977) (explaining that *Robinson* eliminated the need for an arresting officer "to calculate the probability that weapons or destructible evidence may be involved" before conducting a search incident to arrest), *abrogated on other grounds by California v. Acevedo*, 500 U.S. 565 (1991). But neither *Robinson* nor *Riley* rejected the *Chimel* rationales as bookends for the circumstances under which the search-incident-to-arrest exception applies.[14] *See,*

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[14] In fact, in an opinion concurring in part and concurring in the judgment, Justice Alito wrote separately to advance a variation on the court's argument today: that "the [search-incident-to-arrest] rule is not closely linked to the need for officer safety and evidence preservation" because "these rationales fail to explain the rule's well-recognized scope." *Riley*, ___ U.S. at ___, 134 S. Ct. at 2496 (Alito, J., concurring). Whatever the merits of Justice Alito's argument, it is notable that no other member of

e.g., *Knowles v. Iowa*, 525 U.S. 113, 119 (1998) (rejecting the search-incident-to-arrest exception in the context of issuance of citations, "a situation where the concern for officer safety is not present to the same extent and the concern for destruction or loss of evidence is not present at all."). After all, the Supreme Court framed the question in *Riley* as "whether application of the search incident to arrest doctrine to this particular category of effects would '*untether the rule from the justifications underlying the* Chimel *exception*.' " *Riley*, 134 S. Ct. at 2485 (emphasis added) (quoting *Arizona v. Gant*, 556 U.S. 332, 343 (2009)).

More broadly, it is clear that the court *needs* to cast aside the *Chimel* rationales to reach its decision today. The *only* justification for allowing police to conduct a warrantless breath test is the preservation of evidence due to the natural dissipation of alcohol from a person's bloodstream. In *McNeely*, however, the Supreme Court specifically rejected the proposition that the natural metabolization of alcohol constitutes a *per se* exigency justifying a warrantless blood test. ___ U.S. at ___, 133 S. Ct. at 1568. It explained that blood alcohol testing

> is different in critical respects from other destruction-of-evidence cases in which the police are truly confronted with a " 'now-or-never' " situation. In contrast to, for example, circumstances in which the suspect has control over easily disposable evidence, BAC evidence from a drunk-driving suspect natural-

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the Supreme Court joined Justice Alito's concurrence, and that the majority opinion in *Riley* continued to adhere to the two rationales from *Chimel*.

> ly dissipates over time in a gradual and relatively predictable manner.

Id. at ___, 133 S. Ct. at 1561 (internal citations omitted). The Supreme Court then made clear that officers are required to get a warrant to test a suspect's blood alcohol content if they can reasonably do so under the circumstances. *Id.* at ___, 133 S. Ct. at 1561-63; *see also Riley*, ___ U.S. at ___, 134 S. Ct. at 2495 (stating that the answer to "what police must do before searching a cell phone seized incident to arrest is accordingly simple—get a warrant"). It strains credulity to suppose that, after the Supreme Court carefully examined the exigent-circumstances exception in *McNeely*, it would conclude in some future case that the search would have been justified anyway under the search-incident-to-arrest doctrine, which according to *Chimel* and *Riley* turns on the same rationale regarding the preservation of evidence that the Supreme Court explicitly rejected in *McNeely*. *See* ___ U.S. at ___, 133 S. Ct. at 1557 (noting that McNeely was under arrest when the blood test was performed); *see also State v. Villarreal*, ___ S.W.3d ___, 2014 WL 6734178, at *15 (Tex. Crim. App. Nov. 26, 2014) (holding that the search-incident-to-arrest exception "is inapplicable" to a warrantless blood draw because neither of the two *Chimel* justifications applies). In fact, by casting aside *Chimel*'s rationales and creating a novel bright-line rule, the court simply readopts a per se exigency under a different name. *See State v. Shriner*, 751 N.W.2d 538, 549 (Minn. 2008) (establishing the evanescent nature of alcohol in the bloodstream as a single-factor exigency), *abrogated by Missouri v. McNeely*, ___ U.S. ___, 133 S. Ct. 1552, 1558 & n.2 (2013) (no such single-factor exigency exists).

II.

The only remaining question is whether the test-refusal statute, which requires a person to submit to a breath, blood, or urine test upon suspicion of drunk driving or face stiff criminal penalties, is constitutional. *See* Minn. Stat. §§ 169A.20; 169A.24; 169A.25; 169A.26 (2014) (making the crime of test refusal a first-, second-, or third-degree driving-while-impaired offense depending on whether an aggravating factor is present). We conclude that, in Bernard's case, it is not.

In *Camara v. Municipal Court of S.F.*, 387 U.S. 523 (1967), the Supreme Court held that a state cannot criminalize the refusal to consent to an illegal warrantless search. *Id.* at 540; *see also See v. City of Seattle*, 387 U.S. 541 (1967) (companion case). The appellant in *Camara* was charged with a misdemeanor offense when he refused to allow housing inspectors to enter his residence to conduct a search of the premises without a warrant. 387 U.S. at 525-27. The prosecution arose out of a San Francisco ordinance that allowed certain "[a]uthorized employees" of the City to "enter, at reasonable times, any building, structure, or premises in the City to perform any duty imposed upon them by the Municipal Code." *Id.* at 526, 527 n.2. Once the Supreme Court concluded that the search was illegal, it held that the "appellant had a constitutional right to insist that the inspectors obtain a warrant to search and that appellant may not constitutionally be convicted for refusing to consent to the inspection." *Id.* at 540.

There are, to be sure, instances in which it would be constitutional to apply the test-refusal statute to impose criminal penalties on suspected drunk drivers who refuse a blood, breath, or urine test. But

those instances are limited to circumstances in which the underlying search would be constitutional, such as those identified in *McNeely* when, under a totality of the circumstances, it is unreasonable for officers to obtain a warrant. *McNeely*, ___U.S.___, 133 S. Ct. at 1561. The State does not argue in this case that it was unreasonable for the officers to obtain a warrant under the totality of the circumstances. Accordingly, because the search in this case was not a valid warrantless search, and the State may not constitutionally convict persons who exercise their "constitutional right to insist that [police] obtain a warrant," *Camara*, 387 U.S. at 540, we would affirm the district court's decision to dismiss the two counts of test refusal against Bernard.

For the foregoing reasons, we respectfully dissent.

APPENDIX B

844 N.W.2d 41
Court of Appeals of Minnesota.

STATE of Minnesota, Appellant,
v.
William Robert BERNARD, Jr., Respondent.

No. A13–1245. | March 17, 2014.

Background: Defendant was charged with refusal to take breath test requested by police under implied consent law. The District Court, Dakota County, dismissed the charge, and state appealed.

The Court of Appeals, Ross, J., held that prosecution of defendant for refusal to take breath test did not violate his due process rights.

Reversed and remanded.

Lori Swanson, Attorney General, St. Paul, MN; and James C. Backstrom, Dakota County Attorney, Tori K. Stewart, Assistant County Attorney, Karen L. Wangler, Assistant County Attorney, Hastings, MN, for respondent.

Steven T. Grimshaw, Minneapolis, MN,; and Jeffrey S. Sheridan, Strandemo, Sheridan & Dulas, P.A., Eagan, MN, for appellant.

Considered and decided by SMITH, Presiding Judge; ROSS, Judge; and RODENBERG, Judge.

OPINION

William Bernard was arrested for suspected drunk driving and refused to take a breath test requested by police under the state's implied consent law. The state charged Bernard with the crime of test refusal. The district court dismissed the charge, reasoning that the Constitution prohibits the state

was decided and now address the state's appeal in light of *Brooks*.

ISSUE

Did the district court err by concluding that the state cannot criminalize Bernard's refusal to submit to a warrantless breath test because there was no constitutionally permissible basis to conduct a warrantless search?

ANALYSIS

When the state appeals a pretrial order dismissing criminal charges, it must show clearly and unequivocally "that the district court erred and that the error, unless reversed, will have a critical impact on the outcome of the prosecution." *State v. Gradishar*, 765 N.W.2d 901, 902 (Minn.App.2009) (quotation omitted). We can exercise jurisdiction and hear the appeal only if the state satisfies the critical-impact test. *State v. Baxter*, 686 N.W.2d 846, 850 (Minn.App.2004). Our jurisdiction is not in doubt here. A district court order dismissing criminal charges has a critical impact on the prosecution. *Gradishar*, 765 N.W.2d at 902. The district court order effectively ended Bernard's prosecution, so the threshold jurisdictional requirement is met.

The state argues that the district court erroneously dismissed the charges. The challenge raises a question of law, so we may review the undisputed facts independently and decide whether the district court erred by dismissing the charges. *State v. Harris*, 590 N.W.2d 90, 98 (Minn.1999). The district court's decision hinged on whether police could search Bernard. The fulcrum is reasonableness. The federal and state constitutions protect citizens against only unreasonable searches and seizures. U.S. Const. amend. IV; *44 Minn. Const. art. 1, § 10.

A compelled breath test is a search. *Skinner v. Ry. Labor Execs.' Ass'n,* 489 U.S. 602, 616–17, 109 S.Ct. 1402, 1413, 103 L.Ed.2d 639 (1989).

Bernard's two counts of felony test refusal consist of "refus[ing] to submit to a chemical test of the person's blood, breath, or urine." Minn.Stat. § 169A.20, subd. 2 (2012). The statute criminalizes refusal to submit to testing authorized under the implied consent law, which provides that anyone who drives a vehicle and is suspected of being under the influence of alcohol or other drugs has impliedly consented to a blood, breath, or urine test for alcohol. Minn.Stat. § 169A.51, subd. 1(a) (2012). We have interpreted section 169A.20, subdivision 2 as criminalizing refusals to submit to searches that are constitutionally reasonable. *See State v. Wiseman,* 816 N.W.2d 689, 694–95 (Minn.App.2012), *cert. denied,* – U.S. ——, 133 S.Ct. 1585, 185 L.Ed.2d 578 (2013). We reasoned that the state may therefore criminalize a person's refusal to submit to a breath test when it obtains a search warrant or demonstrates that an exception to the warrant requirement applies. *Id.* Consent is one established exception, *State v. Othoudt,* 482 N.W.2d 218, 222 (Minn.1992), and search incident to arrest is another, *Arizona v. Gant,* 556 U.S. 332, 338, 129 S.Ct. 1710, 1716, 173 L.Ed.2d 485 (2009). The common exception in chemical testing has been exigent circumstances. *See, e.g., State v. Netland,* 762 N.W.2d 202 (Minn.2009); *Wiseman,* 816 N.W.2d 689. This exception authorizes a warrantless search if police have probable cause that the suspect committed a crime and exigent circumstances necessitate an immediate search. *Kentucky v. King,* —— U.S. ——, 131 S.Ct. 1849, 1856, 179 L.Ed.2d 865 (2011).

Our state supreme court held in *State v. Shriner* that a warrantless blood draw was constitutionally reasonable because the natural dissipation of alcohol in the blood constituted a per se exigent circumstance. 751 N.W.2d 538, 549–50 (Minn.2008), *abrogated by McNeely*, 133 S.Ct. 1552. It affirmed this approach in *State v. Netland*, 762 N.W.2d at 214. We later observed that the term "implied consent" is a misnomer because the statute criminalizes "refusal to '*submit* to a chemical test,' not ... refusal to *consent* to a chemical test." *Wiseman*, 816 N.W.2d at 693 (first emphasis added) (quoting Minn.Stat. § 169A.20, subd. 2 (2008)). Following *Shriner*, we explained that the natural dissipation of alcohol in the blood justified warrantless testing of suspected drunk drivers. *Id.* at 694. Because these searches were constitutionally reasonable, police did not need consent to conduct them and we saw no constitutional right to refuse to submit. *Id.* at 695. We therefore affirmed the criminal penalties as constitutional. *Id.* at 696.

Bernard takes the position that the Supreme Court relandscaped in *McNeely* by holding that the dissipation of alcohol in the bloodstream did *not* constitute a per se exigent circumstance permitting police to draw blood for testing against the will of a suspected drunk driver. *See* 133 S.Ct. at 1567–68. Under *McNeely*, police who draw blood against the driver's will must demonstrate that, based on the totality of the circumstances, a warrantless search is justified. *Id.* at 1568. Under Bernard's theory, *McNeely*, as applied through *Wiseman*, bars criminal charges for test refusal because it eliminates what had been a per se exigent circumstance that justifies both executing a search and criminalizing a refusal.

The state supreme court recently considered *McNeely* 's impact on our implied consent law in *State v. Brooks,* 838 N.W.2d 563, 567 (Minn.2013), *pet. for cert. filed* (U.S. Feb. 24, 2014). But *Brooks* does not answer our question because, unlike here, in that case the defendant ultimately submitted to testing and the court held that, under the totality of the circumstances, he freely and voluntarily consented to the chemical tests. *Id.* at 572. Because Bernard never submitted to a test, *Brooks*'s holding is inapposite.

We focus on *Wiseman,* which we do not read as narrowly as Bernard implicitly asks us to. As we explained in *Wiseman,* under the implied consent statute "the legislature has criminalized a suspect's refusal to comply with a police officer's lawful search." 816 N.W.2d at 696. In that case, because we assumed the existence of exigent circumstances that would have justified the officer to conduct a search even without the suspected drunk driver's consent, we held that he "has not demonstrated the existence of a fundamental right, recognized under either federal or Minnesota law, to passively or nonviolently refuse to submit to a constitutionally reasonable police search." *Id.* at 695. We therefore saw no violation of Wiseman's substantive due process rights by the state's authority to prosecute Wiseman for refusing to submit to a breath test. *Id.* at 696.

Bernard would have us hold that because exigent circumstances did not exist when the officer asked him to submit to a chemical test (so that the Fourth Amendment would have precluded the officer from forcing a hypothetical warrantless test against Bernard's will), prosecuting him for refusing to consent to the test violates his due process rights. But we think the broader proposition that we summarized in

Wiseman also applies here. We explained there that "[t]he imposition of criminal penalties for refusing to submit to a constitutionally reasonable police search, namely, a chemical test of ... breath ... supported by probable cause, is a reasonable means to facilitate a permissible state objective." *Id.* We do not here consider the constitutionality of a hypothetical warrantless search in the absence of consent as we did in *Wiseman* when we rejected Wiseman's constitutional argument. Assuming under these facts that, after *McNeely*, the officer would not have been justified to conduct a warrantless search (a proposition the state disputes), we can consider whether the officer's request was appropriate on other grounds. We hold that it was.

Because the officer indisputably had probable cause to believe that Bernard was driving while impaired (he was identified by witnesses as the driver, he was holding the truck keys, and his wardrobe, instability, and odor indicated that he was intoxicated), the officer also indisputably had the option to obtain a test of Bernard's blood by search warrant. *See* U.S. Const. amend. IV. (requiring probable cause for search warrants); Minn.Stat. § 626.11(a) (2012) ("If the judge is satisfied ... that there is probable cause ... the judge must issue a signed search warrant...."); Minn.Stat. § 169A.20, subd. 1 ("It is a crime for any person to drive ... any motor vehicle ... when ... the person is under the influence of alcohol."); *Illinois v. Gates*, 462 U.S. 213, 238, 103 S.Ct. 2317, 2332, 76 L.Ed.2d 527 (1983) (holding that probable cause to search exists when, under the circumstances, there is a "fair probability that contraband or evidence of a crime will be found in a particular place"). So at the time the officer asked Bernard whether he would submit to a breath test, the officer could have just as

lawfully asked an independent jurist to issue a search warrant to test Bernard's blood. Like the hypothetical warrantless test available to the officer in *Wiseman*, a hypothetical warrant-sponsored test is also a "constitutionally reasonable police search." In other words, the officer had a lawful option to require Bernard to submit to a chemical test, based on a search warrant, and he instead gave Bernard the choice to voluntarily submit to warrantless testing. That the officer chose one approach (the authority to make the request under the implied consent statute) rather than another (the authority to obtain a warrant under the impaired driving statute) does not make penalizing Bernard's decision unconstitutional because the consequent testing under either approach would have been constitutionally reasonable. We recognize that the officer did not actually possess a search warrant at the time of his request, but the constitutional and statutory grounds for a warrant plainly existed before the request. Just as we deemed significant the fact that the officer in *Wiseman* could have lawfully taken a nonconsensual approach theoretically available to him, we deem it significant that the officer here also could have lawfully taken a nonconsensual approach. The officers in both cases instead asked the suspected drunk driver to voluntarily submit to testing. We recognize that the alternative to obtaining a chemical test here, like the *Wiseman* hypothetical alternative, is purely theoretical, because the implied consent law admonishes police that "a test must not be given" if the driver refuses. Minn.Stat. § 169A.52, subd. 1 (2012). But the question in both settings is whether the requesting officer had a *constitutionally* viable alternative. We hold that Bernard's prosecution did not implicate any

fundamental due process rights, just as we held as to Wiseman's prosecution.

Although it does not drive our analysis, we add that this holding affords a significant practical advantage over the holding that Bernard urges. Prohibiting the state from charging a driver for test refusal on the notion that the state's authority depends on whether, in each particular case, exigent circumstances *would have* justified the requesting officer to conduct a warrantless search at the time she made the request adds prosecutorial and judicial complications without providing any constitutionally significant benefit to defendants. The new constitutional rule would put the myriad test-refusal factual scenarios on a spectrum depending on various circumstances surrounding the test request, especially after *McNeely*. On one end, exigent circumstances would have clearly justified a hypothetical warrantless search at the time of the refused test request, so the refusal to test could certainly be prosecuted. On the other end, exigent circumstances would clearly not have justified a warrantless search, so the refusal could certainly *not* be prosecuted. And in the vast majority of cases in the middle, one could reasonably argue either way as to whether the temporal and logistical and practical circumstances supported a hypothetical warrantless search, so another round of collateral litigation would become necessary. We would probably call it a *Bernard* hearing. Anticipating the hearing, arresting officers would have the incentive to delay asking for the chemical test until near the end of the two-hour statutory testing period, *see* Minn.Stat. § 169A.20, subd. 1(5), making a finding of exigency more likely. Some offenders could be prosecuted and others not, based on details that differ in constitutionally insignificant ways. (For exam-

ple, an officer has a mechanical problem on the way to jail with her intoxicated arrestee while another officer does not; the delayed officer can make an argument that exigent circumstances existed at the time of the test refusal while the other cannot.)

The state offers two alternative theories to contend that the officer could have conducted a *warrantless* chemical test here. It maintains that the search-incident-to-arrest exception applies and that breath tests garner less Fourth Amendment protection than blood tests. Although not necessary to our decision, we address both briefly. We observe that, despite some apparent confusion in the caselaw, the Supreme Court in *Schmerber v. California* initially analyzed forced blood draws as searches incident to arrest. 384 U.S. 757, 768–71, 86 S.Ct. 1826, 1834–36, 16 L.Ed.2d 908 (1966). This analytical framework facially seems to support the state's argument, but we add that the *Schmerber* Court, like the *McNeely* Court, saw exigency as a key component of a constitutionally appropriate warrantless blood test. *Compare id.* at 769–72, 86 S.Ct. at 1835–36 (holding that passage of time created exigencies that superseded suspect's privacy interest in avoiding a warrantless blood draw), *with McNeely*, 133 S.Ct. at 1568 (holding that evanescent nature of alcohol in the body does not, by itself, establish a per se exigency justifying warrantless blood draws). So treating the hypothetical warrantless test as a search incident to arrest cannot be sufficient without also satisfying the exigency requirement. Regarding the notion that breath tests are less protected than blood tests, the *Schmerber* Court referred to a blood draw as being only moderately intrusive ("commonplace in these days of periodic physical examinations," ... "the quantity of blood extracted is minimal," ... "for most

people the procedure involves virtually no risk, trauma, or pain"), 384 U.S. at 771, 86 S.Ct. at 1836, while the *McNeely* Court described a blood draw in more intrusive terms ("a compelled physical intrusion beneath McNeely's skin and into his veins," ... "an invasion of bodily integrity"), 133 S.Ct. at 1558. But the Supreme Court in both cases treated the existence or lack of exigent circumstances as the critical factor bearing on whether a compelled warrantless blood test could survive constitutional scrutiny; the degree of intrusiveness clearly was not the dispositive issue. The state's arguments on these points are not compelling, but in light of our holding, we do not decide them.

We similarly do not reach the state's argument that the district court applied the wrong test when it relied on the factors announced in *Dorman v. United States*, 435 F.2d 385, 392–93 (D.C.Cir.1970), to analyze the totality of the circumstances, or Bernard's argument that the implied consent law is unconstitutional because it conditions the exercise of the privilege of driving on the driver surrendering his constitutional right to be free of unreasonable searches and seizures.

DECISION

The state is not constitutionally precluded from criminalizing a suspected drunk driver's refusal to submit to a chemical test under circumstances in which the requesting officer had grounds to have obtained a constitutionally reasonable nonconsensual chemical test by securing and executing a warrant requiring the driver to submit to testing.

Reversed and remanded.

APPENDIX C

STATE OF MINNESOTA
COUNTY OF DAKOTA

DISTRICT COURT
FIRST JUDICIAL DISTRICT

File No. 19ha-Cr-12-2741
State Of Minnesota,
Plaintiff,
Vs.
William Robert Bernard,
Defendant.

ORDER

The above-entitled matter came before the Honorable Jerome B. Abrams, Judge of District Court, on June 21, 2013, at the Dakota County Courthouse, Hastings, Minnesota. Karen Wangler, Assistant County Attorney, appeared as counsel for and on behalf of the State of Minnesota. Steven Grimshaw, Attorney at Law, appeared as counsel for and on behalf of the Defendant.

The parties agreed to submit the matter on a limited record consisting of the Court file, the Defendant's motion to dismiss and accompanying memorandum, and a reply brief from the State.[1] A deadline of June 28, 2013 was set for submission of the State's brief and the matter was taken under advisement at that time.

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[1]The Court expressly invited the State to comment on the impact of *State v. Wiseman*, 816 N.W.2d 689 (Minn. App. 2012) to this case in light of the recent ruling in *Missouri v. McNeely*, 569 U.S. ___,133 S. Ct. 1552 (2013). No such comment was made.

Based upon the proceedings, this Court makes the following:

ORDER

1. This matter is dismissed because there is no evidence the Defendant committed the crime of test refusal, as interpreted by the Minnesota Court of Appeals in *State v. Wiseman*, 816 N.W.2d 689 (Minn. App. 2012), *pet. for rev. den.* (Minn. Sept. 25, 2012), *pet. for cert. den.* 133 S. Ct. 1585 (Mar. 18, 2013), alleged in counts one and two of the Complaint.

2. The Defendant's request to have Minnesota Statute § 169A.20, subdivision 2 declared unconstitutional is denied.

3. The attached memorandum of law sets for the Court's reasoning for this decision and is incorporated herein by reference.

Dated: June 28, 2013

BY THE COURT:

_/s/_____
Jerome B. Abrams
Judge of District Court

MEMORANDUM

This matter came before the Court on the Defendant's motion to dismiss the two "test refusal" charges brought against him; separate violations of Minnesota Statute §§ 169A.20, subdivision 2; 169A.24, subdivisions 1(1)-(2) and 2; and 169A.276, subdivision 1(a). The Defendant argues the "Doctrine of Unconstitutional Conditions" renders Minnesota Statute § 169A.20, subdivision 2 unconstitutional in light of the holding in *Missouri v. McNeely*, 569 U.S., 133 S. Ct. 1552 (2013) (hereinafter referred to as "*McNeely*"). The State disagrees with the Defendant's position and argues *McNeely* does not apply or affect this case because the facts are different.

The Complaint recites the facts of this case. On August 5, 2012 at approximately 7:00 p.m. peace officers were dispatched to a boat launch in South St. Paul, Minnesota. Upon arriving at the scene, a witness directed officers to "three drunk males [fl] attempting to pull a boat from the water [when] their truck got stuck." At least two witnesses identified the Defendant, by his lack of pants, as the driver of the truck. Officers observed a strong odor of alcoholic beverage coming from the group of three men and specifically observed the odor of alcoholic beverage from the Defendant's breath. In addition, officers observed the Defendant had bloodshot and watery eyes. The Defendant admitted to drinking but adamantly insisted he was not the driver of the vehicle. However, the officers obtained the keys for the vehicle from the Defendant.

Officers asked the Defendant to perform field sobriety tests but he refused. The Defendant was then placed under arrest and transported to the South St. Paul Police Department where he was read the Min-

nesota Implied Consent Advisory. Officers asked the Defendant to take a breath test. The Defendant refused. No warrant was obtained authorizing a breath test of the Defendant on August 5, 2012. Based upon the Defendant's refusal to provide breath samples for a breath test and a criminal history showing prior driving while intoxicated convictions, the Defendant was charged as described above. The Defendant was not charged with operating or being in physical control of a motor vehicle while under the influence of alcohol. *See* Minn. Stat. § 169A.20, subd. 1.

Wiseman

The Defendant challenges the constitutionality of Minnesota Statute § 169A.20, subdivision 2; making it a crime to refuse to submit to a test of blood, breath, or urine for alcohol concentration. The Minnesota Court of Appeals addressed a challenge to the constitutionality section 169A.20, subdivision 2 on substantive due process grounds in *State v. Wiseman*. 816 N.W.2d 689 (Minn. App. July 16, 2012), *rev. denied* (Minn. Sept. 25, 2012), *cert. denied* 133 S. Ct. 1585 (Mar. 18, 2013). The specific challenge in *Wiseman* was whether the Defendant had a "fundamental right to passively or nonviolently 'refuse to consent to a warrantless' search and thereby refuse to produce" a blood or urine sample for alcohol concentration testing. *Id.* at 693. The Court noted Minnesota statutes are presumed constitutional and will only "strike down a statute as unconstitutional only if absolutely necessary." *Id.* at 692 (*citing State v. Melde*, 725 N.W.2d 99, 102 (Minn. 2006)).

The Court started its analysis by determining what level of scrutiny should be applied to review the constitutionality of the statute. *Id.* at 692-3. The Court explained that review of a law implicating a

fundamental right would be subject to strict scrutiny; "upheld only if the state demonstrates that the law is necessary to serve a compelling state interest and narrowly tailored to serve that interest." *Id.* at 692-3 (*citing In re Linehan*, 594 N.W.2d 867, 872 (Minn. 1999) and *Essling v. Markman*, 335 N.W.2d 237, 239 (Minn. 1983)). For "legislative enactment[s that] do[] not implicate a fundamental right, substantive due process requires only that the law is not arbitrary or capricious or that it reflects a reasonable means to a permissible state objective." *Id.* at 693 (*citing State v. Behl*, 564 N.W.2d 560, 567 (Minn. 1997)). Fundamental rights include those set forth in the "Bill of Rights." *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (citing "long line of cases" where "liberty" guaranteed by Due Process Clause includes rights "in addition to the specific freedoms protected by the Bill of Rights"), *cited by Wiseman*, 816 N.W.2d at 693. The constitutional guarantee of freedom from unreasonable searches and seizures is therefore a fundamental right. *See, e.g., California v. Carney*, 471 U.S. 386, 390 (1985) (describing Fourth Amendment protection as fundamental right); *Ker v. State of Cal.*, 374 U.S. 23, 32-3 (1963) (stating "Fourth Amendment's protection from unreasonable searches and seizures . . . has been declared to be as of the very essence of constitutional liberty the guaranty of which is as important and as imperative as are the guaranties of the other fundamental rights of the individual citizen . . .") (internal quotations omitted).

Wiseman's constitutional challenge, however, did "not implicate a specific constitutional provision [because he] acknowledge[d] that the police were justified in collecting a sample for chemical testing under the exigent-circumstances exception to the warrant requirement . . . ," *Wiseman*, 816 N.W.2d at 693 (*cit-*

ing Schmerber v. California, 384 U.S. 757, 772, 86 S.Ct. 1826, 1836, 16 L.Ed.2d 908 (1966) and *State v. Netland*, 762 N.W.2d 202, 212-13 (Minn. 2009)). As a consequence, the Court determined Wiseman had not demonstrated implication of a fundamental right and applied a rational basis test. *Id.* at 695. In reaching this decision, the Court of Appeals observed that Minnesota Statute § 169A.20, subdivision 2 only criminalized "refusal to submit to a chemical test,' not a person's refusal to *consent* to a chemical test." *Id.* at 693 (emphasis in original). The Court used this distinction to distinguish other cases[2] recognizing a "fundamental right" in the form of a "'liberty interest against unreasonable prying into [] personal affairs.'" *Id*, at 695. Specifically, the police had lawful authority to conduct a search without a warrant "because it f[ell] within the exigent-circumstances exception to the warrant requirement." *Id.* at 695 (*quoting State v. George*, 557 N.W.2d 575, 581 (Minn. 1997) and *Netland*, 762 N.W.2d at 212-3, respectively). Due to the presence of the exigent circumstances exception, "neither a warrant nor consent are necessary to administer a constitutionally reasonable chemical test supported by probable cause [and the Court's] analysis turn[ed] on whether there exists a fundamental right to passively or nonviolently refuse to submit to a constitutionally reasonable police search." *Id.* at 694.

With this in mind, the Court of Appeals found Minnesota's test refusal statute constitutional. Id. at

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[2] The cases cited by the Court of Appeals include *State.v. Larson*, 788 N.W.2d 25, 32-3 (Minn. 2010), *State v. George*, 557 N.W.2d 575, 581 (Minn. 1997), and *State v. Dezso*, 512 N.W.2d 877, 880-1 (Minn. 1994).

696. "Impaired drivers pose a severe threat to the health and safety of motorists in Minnesota, and the state has a compelling interest in highway safety that justifies efforts to keep impaired drivers off the road." *Id.* at 695 (*citing Bendorf v. Comm'r of Pub. Safety*, 727 N.W.2d 410, 416-17 (Minn. 2007)). The state therefore "has a legitimate, time-sensitive interest in obtaining a blood, breath, or urine sample for chemical testing from an individual when the police have probable cause to believe that the individual committed criminal vehicular operation." *Id. (citing Netland*, 762 N.W.2d at 212-13 and *State v. Shriner*, 751 N.W.2d 538, 549-50 (Minn. 2008)). The legislature has the "exclusive province to define by statute what acts constitute criminal conduct" *Id.* at 696 (*citing Behl*, 564 N.W.2d at 568). Criminalizing refusal to "cooperate with [an officer's] constitutionally reasonable search" "constitutes a reasonable means to achieve a permissible state objective and does not violate [a driver's] right to substantive due process." *Id.*

To reach the holding of *Wiseman*, the Court narrowly construed Minnesota Statute § 169A.20, subdivision 2 as "criminaliz[ing] a suspect's refusal to comply with a police officer's ***lawful*** search." *Id.* at 696 (emphasis added).[3] The search[4] of Wiseman was

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[3] The State cited *South Dakota v. Neville*, 459 U.S. 553, 560 (1982) for the proposition that "the penalty of taking away a driver's license for refusing to take a blood alcohol test was unquestionably legitimate." Notwithstanding that the issue in this case is not revocation or suspension of the Defendant's license as it was in *Neville*, but probable cause to support a criminal charge, the United States Supreme Court actually held in *Neville* "that that a refusal to take a blood-alcohol test, after a police officer has *lawfully* requested it, is not an act coerced by the officer . . . . " *Id.* at 564 (emphasis added).

admittedly lawful because under the Minnesota Supreme Court's holding in *Netland* because "the evanescent nature of the evidence creates the conditions that justify a warrantless search" under the exigent circumstances exception to the warrant requirement found in the United States and Minnesota Constitutions. 762 N.W.2d at 213, *cited by Wiseman*, 816 N.W.2d at 693. The United States Supreme Court, however, has rejected the categorical conclusion that "the natural dissipation of alcohol in the blood may support a finding of exigency." *McNeely*, 569 U.S. at___, 133 S. Ct. at 1563. Each individual case must be reviewed for exigency in light of the total circumstances. *Id.* It is within this framework of constitutional and statutory interpretation that this Court must decide this case.

Defendant's Challenge to Test Refusal

The Minnesota and United States Constitutions prohibit unreasonable searches and seizures and afford the fundamental right to be free from the same. U.S. Const. amend. IV; Minn. Const., art. 1, § 10. Blood, breath, and urine alcohol concentration tests are all "searches." *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 616-7 (1989) (discussing prior holdings that blood was a search and holding breath and urine are searches), *cited by McNeely*, 569 U.S. at ___, 133 S. Ct. at 1558 (*citing Schmerber v. California*, 384 U.S. 757, 758, 770 (1966)) and *by State v. Netland*, 762 N.W.2d 202, 212 (Minn. 2009) (holding breath sample a search). "It is well settled under the Fourth and Fourteenth Amendments to the United States Constitution that a search con-

[4] Wiseman was asked to submit to a blood or urine alcohol concentration test based upon probable cause of driving under the influence of alcohol.

ducted without a warrant issued upon probable cause is 'per se unreasonable . . . subject only to a few specifically established and well delineated exceptions." *State v. Hanley*, 363 N.W.2d 735, 738 (Minn. 1985) (*quoting Katz v. United States*, 389 U.S. 347, 357 (1967); *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55 (1971)). Consent is such an exception. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973), *cited by State v. Hanley*, 363 N.W.2d 735, 738 (Minn. 1985); *State v. Othoudt*, 482 N.W.2d 218, 222 (Minn. 1992). As the State notes in this case, the Defendant refused to consent to provide a sample of his breath. Exigent circumstances are another such exception to the warrant requirement. *McNeely*, 569 U.S. at __ 133 S. Ct. at 1558 (*discussing Schmerber*, 384 U.S. at 758, 770 and *citing Kentucky v. King*, 563 U.S. ___, ___, 131 S.Ct. 1849, 1856 (2011)). No other exceptions have been identified as being present in this case.

Under the interpretation of Minnesota Statute § 169A.20, subdivision 2 set forth in *Wiseman*, refusal to provide the requested sample for alcohol concentration analysis is only criminalized if the requesting officer has a lawful basis to conduct the search. The exigent circumstances exception is the only identified basis for justifying the request for a breath test in this case. While the Minnesota Supreme Court previously held that single factor exigent circumstances justified a warrantless search when an officer had probable cause to believe a suspect was in possession of a motor vehicle while under the influence of alcohol, the United States Supreme Court has rejected the use of single factor exigency to justify such warrantless searches. *McNeely*, 569 U.S. at ___, 133 S. Ct. at 1557-8, 1558 n. 2, & 1560-3, *abrogating State v. Netland*, 762 N.W.2d 202, 212-4 (Minn. 2009) (*cit-*

ing State v. Shriner, 751 N.W.2d 538, 541, 548-50 (Minn. 2008). The United States Supreme Court specifically held that "[w]hether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case based on the totality of the circumstances." *Id.* at __, 133 S. Ct. at 1563. The Court declined to provide further guidance on what "relevant factors [] can be taken into account in determining the reasonableness of acting without a warrant" as part of its decision in *McNeely*. *Cf. id.* at __, 133 S. Ct. at 1568, 1569 (J. Kennedy concurring) *with* 1573-4 (C.J. Roberts dissenting), 1577-8 (J. Thomas dissenting).

The totality of the circumstances of each case may provide the exigency that justifies conducting a search without a warrant. *McNeely*, 569 U.S. at __, 133 S. Ct. at 1559-60; *State v. Gray*, 456 N.W.2d 251, 256 (Minn. 1990). *See also Schmerber*, 384 U.S. at 758-9, 770 (applying totality of circumstances approach to alcohol concentration blood test over driver's objection following accident). In the absence of further guidance from the United States Supreme Court, the Minnesota Supreme Court uses the "*Dorman* analysis[] with the understanding that the *Dorman* factors are part of a flexible approach that encompasses all relevant circumstances." *State v. Olson*, 436 N.W.2d 92, 96-7 (Minn. 1989) (*referring to Dorman v. United States*, 435 F.2d 385, 392-93 (D.C. Cir. 1970)), *aff'd Minnesota v. Olson*, 495 U.S. 91 (1990). *See also McNeely*, 569 U.S. at __, 133 S. Ct. at 1568, 1569 (J. Kennedy concurring) (declining to provide further guidance); *Welsh v. Wisconsin*, 466 U.S. 740, 751-3 (1984) (discussing and adopting *Dorman* gravity of offense factor but not adopting and expressly refusing to adopt all factors); *Gray*, 456 N.W.2d at 256 (stating "[t]he U.S. Supreme

Court has not adopted a definite test for determining when exigent circumstances exist"). The *Dorman* factors are:

> (a) whether the offense is a grave offense, particularly a crime of violence;
>
> (b) whether the suspect is reasonably believed to be armed;
>
> (c) whether the showing of probable cause connecting the defendant to the offense is more than minimal;
>
> (d) whether the police have strong reason to believe that the suspect is in the premise being entered; and
>
> (e) whether there is a likelihood that the suspect will escape if not swiftly apprehended.

Olson, 438 N.W.2d at 97 n. 1 *(citing Dorman*, 435 F.2d at 392-3). *See also Gray*, 456 N.W.2d at 256 (flexibly applying Dorman factors in light of totality of the circumstances and including sixth factor of peaceable entry), *cited by In re B.R.K.*, 658 N.W.2d 565, 579 (Minn. 2003) (holding underage drinking not a grave offense); *State v. Lohnes*, 344 N.W.2d 605, 610-1 (Minn. 1984) (same), *cited by State v. Storvick*, 428 N.W.2d 55, 58-9 (Minn. 1988). The Minnesota Court of Appeals has considered "a defendant's capability of destroying evidence" a factor to be considered as part of the totality of the circumstances analysis. *State v. Lussier*, 770 N.W.2d 581, 588 (Minn. App. 2009) (*citing Loftus v. State*, 357 N.W.2d 419, 421 (Minn. App. 1984)). *See also McNeely*, 569 U.S. at ___, 133 S. Ct. at 1563 (holding "natural dissipation of alcohol in the blood may support finding of exigency [but] does not do so categori-

cally"). "The state has the burden of showing the existence of exigent circumstances." *Gray*, 456 N.W.2d at 256 (*citing Welsh v. Wisconsin*, 466 U.S. 740, 749-50 (1984)).

The totality of the circumstances in this case does not establish an exigency separate from that prohibited by the United States Supreme Court in *McNeely*. Being in possession of a motor vehicle while under the influence of alcohol is a grave offense but not as serious as murder or vehicular homicide. Officers at the scene had adequate probable cause to place the Defendant under arrest for being in possession of a motor vehicle while under the influence of alcohol and the officers did in fact place the Defendant under arrest. As a consequence, there was no reason to believe the Defendant would become "armed" by getting back into the vehicle and posing a risk to himself or others. There was also no reason to believe the Defendant would flee, or would otherwise become unreachable. The officers were presented with a situation where the Defendant was naturally metabolizing the alcohol in his blood but there was no other reason to believe an emergency was taking place. Pursuant to *McNeely*, the United States Supreme Court requires something more than this "natural dissipation of alcohol in the blood" to establish an exigency justifying a warrantless search. The State has failed set forth any additional facts which would demonstrate an emergency existed in this case.

The officers in this case lacked a warrant or some other lawful basis to "search" the Defendant through collection of a blood, breath, or urine sample. As a consequence, there was no ***lawful*** basis to request the Defendant submit to such testing. The Minnesota

Court of Appeals' narrow reading in *Wiseman* of what is criminalized by Minnesota Statute § 169A.20, subdivision 2 does not include an officer's request for an individual to submit to an alcohol concentration test of a blood, breath, or urine sample unless the request is premised upon a ***lawful*** basis. Because no warrant was obtained and none of the recognized exceptions to the warrant requirement apply, no lawful basis exists in this case to request submission to a chemical test. The Defendant's action of refusing to submit to the requested breath test therefore does not fall within the scope of activity criminalized by Minnesota Statute § 169A.20 and the charges must be dismissed. Any other conclusion would render Minnesota Statute § 169A.20 unconstitutional because it would allow the government to conduct "an invasion of bodily integrity [that] implicates an individual's 'most personal and deep-rooted expectations of privacy'" without a lawful basis to request submission to the search. *McNeely*, 569 U.S. at ___, 133 S. Ct. at 1558 (*citing Winston v. Lee*, 470 U.S. 753, 760 (1985) and *Skinner*, 489 U.S. at 616. It would be tantamount to criminalizing an individual's assertion of the right afforded to them by the Fourth Amendment of the United States Constitution. This Court is obligated to construe the legislative intent expressed in Minnesota statutes in a manner that renders them constitutional and is further obligated to uphold the protections of both the United States and Minnesota Constitutions as set forth by the United States Supreme Court and Minnesota Appellate Courts. The opinions reached in this matter do both.

Unconstitutional Conditions Doctrine

"The unconstitutional conditions doctrine originated in *Frost v. R.R. Comm'n of Cal.*, [271 U.S. 583, 592 (1926)] when the Supreme Court discussed the rights of foreign corporations to conduct business across state lines without heavy regulatory burdens that would effectively preclude commerce. *Netland*, 762 N.W.2d at 211. The United States Supreme Court stated in *Frost* that:

> the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited, and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence.

271 U.S. at 593-4. "Principally, the unconstitutional conditions doctrine reflects a limit on the state's ability to coerce waiver of a constitutional right where the state may not impose on that right directly." *Netland*, 762 N.W.2d at 211 (citation omitted). "[T]oilo invoke this 'unconstitutional conditions' doctrine, [a party] must first show the statute in question in fact denies them a benefit they could otherwise obtain by giving up their [constitutional] rights." *Council of Independent Tobacco Manufacturers of America, Carolina Tobacco Co., Winner Tobacco Wholesale, Inc. v. State*, 713 N.W.2d 300, 306

(Minn. 2006) (*citing Perry v. Sindermann*, 408 U.S. 593, 598 (1972)). Therefore, the Defendant "must establish that the criminal test-refusal statute authorizes an unconstitutional search." *Netland*, 762 N.W.2d at 212. The Defendant is unable to make this showing because the Minnesota Court of Appeals, in *Wiseman*, narrowly construed Minnesota Statute § 169A.20, subdivision 2 to only criminalize refusal to submit to a test in the face of a ***lawful*** request; one within the confines of the Fourth Amendment. The Defendant's request to have Minnesota Statute § 169A.20, subdivision 2 declared unconstitutional due to the "unconstitutional conditions doctrine" is therefore denied.

APPENDIX D

STATE OF MINNESOTA
IN SUPREME COURT
A13-1245

State of Minnesota,
Respondent,
vs.
William Robert Bernard, Jr.,
Appellant.

ORDER

Appellant William Robert Bernard, Jr. filed a petition for rehearing, arguing the court failed to properly consider *Schmerber v. California,* 384 U.S. 757 (1966), and *Missouri v. McNeely,* _____ U.S. ____, 133 S. Ct. 1552 (2013), in reaching its decision in this case. While members of the court disagree about the effect of these cases, the court considered them in reaching its decision.

Based upon all the files, records, and proceedings herein,

IT IS HEREBY ORDERED that appellant's petition for rehearing is denied.

Dated: March 16, 2015

BY THE COURT:

/s/

Lorie S. Gildea
Chief Justice